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XHZ

TRUSTS
FOR
BUSINESS PURPOSES

BY

WILLIAM C. DUNN

OF THE CHICAGO BAR

CHICAGO
CALLAGHAN AND COMPANY
1922

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PREFACE.

In all probability no part of our law is so well settled as that in reference to trusts and trustees; a rule on this subject laid down in one section of the country is usually adopted and applied in another. The reason for this is readily found in that the principles underlying the trust are the same throughout the country irrespective of state lines. This of course is not true of the corporation, for each state has its own acts and no state is bound by the interpretation of the corporate law of a sister state.

The trust as a business organization may easily be investigated under:

First: The source of its rights and its status in the law.

Second: The relation of trustee and beneficiary, and the rights and duties of each, and

Third: The effect of legislation on the trust. In this connection it is of interest to note that the trust may engage and do all things which an individual may do; and so far the only restriction sought to be placed on the individual is in banking and insurance.

In the preparation of this work, reports were examined and not reference works, and where possible the language of the decision is used, with the thought in mind that the busy lawyer is more interested in the law expressed by the court than the deductions of a law writer. In one sense this may be considered a digest of the law as to the trust; and in another, a com-

pilation of selected, leading cases which bear directly on the trust as used for business purposes.

This volume is offered to lawyers and the public with the hope that a closer acquaintance and a better understanding of the trust as a business organization may be acquired.

December 15, 1922. William C. Dunn.

FOREWORD.

For many years past, corporation law has been changing constantly; business has been affected to such an extent by these changes that it now asks if there is not some stable mode of organization to which it might attach. At the forty-fourth annual convention of the American Bar Association at Cincinnati, Ohio, in August, 1921, Elihu Root, distinguished lawyer and former Secretary of State, said: "Modification of the principles of law is going on at greater speed and in larger scope than ever before, changes in the administration of law have forced themselves even to the attention of the public. The application of law is so widely different from that of fifty years ago that some guiding line must be found." Business men carrying on trade and commerce have felt the full force of this statement far more than any other body of men in this country, for they have had to meet it, and without choice are compelled to comply with the ever-changing corporate law.

In our forty-eight states, some of the legislatures meet every year and some of them every other year, and upon an examination of their statutes scarcely one will be found in the last decade where the legislature has not passed some act in reference to corporations; in some cases amendments have been made and in others the corporate law has been revised and reenacted in its entirety. This procedure is perfectly natural, for with the expansion of business, the corporation law, of necessity, must change to meet the new problems presented in the business world. The corporation being a creature of the

law, depends for its existence on a franchise and can do only what the state grants in the way of a privilege; this is the chief reason why new rules must constantly be made and added to a much over-burdened business conducted under corporate organization. While this is true of the corporation, it has no application to the trust, for the principles underlying the latter form of business organization are entirely different from those of the corporation in that the trust is not a creature of the law, it is not beholding to the state for a franchise nor does it exist by reason of any grant or privilege; its position in the law is that of a right—the same as the right of an individual—to alienate property and to contract, and this right is protected in our law, and by our Constitution.

The foreign corporation law brings added annoyance and expense to concerns doing an interstate business. In the early days of our country, when business was local, state lines were scarcely ever crossed, and business was not worried about foreign corporation acts; but today it has expanded and become so centralized that state lines mean nothing more than demarkations where additional fees may be collected as a foreign corporation tax.

With the progress of our country, the expansion of business, the amendments and changes in our corporate law to meet this development, we have a situation in which the state, through its corporate law with its rules and regulations, is a dominant figure in the world of business. This condition was brought about not by any particular thought or design, it is evolutionary and it is here as a problem. Years ago there was great controversy over the church and state which eventually led to the separation of the two; today business asks if there is not a way whereby it may be divorced from an increasing political domination. Government in its inception has for its purpose the protection

of property; but where business is subservient to the state, socialism or paternalism prevails. The state, as a matter of course, should protect the citizens from fraud and imposition, and the police powers properly applied are sufficient to meet any emergency or contingency and are adequate for suitable regulation, but controlling business by use of the corporate law is quite another question.

The express companies long ago realized the impracticability of the corporation law; they found how unsuitable it was for them to comply with all the foreign corporation laws of the different states in which they might transact business, and they solved their difficulty by adopting a form of organization something akin to a trust. In general, the organization under which they operated and conducted one of the largest businesses in the country, may be described as an association or joint-stock company with trust powers; several decisions are reported in this work which show in detail the exact character of their organization. Like the express companies fifty years ago, business in general is casting about today for an organization that will be permanent in form, one that knows no state boundaries, one where personal liability is limited, and one that will permit it to do business in any part of the country without being hampered by state lines and a foreign corporation tax. All of this may be done under a pure trust, and this form of organization properly applied to present needs and for legitimate ends, will, in a great measure, relieve business from certain burdens, most of which are political.

The principles of law underlying the trust are thoroughly settled and well established. The application of these principles to modern business is becoming better understood each day; business men and lawyers in groups here and there throughout the country have applied the trust as a business or-

ganization to all kinds of enterprise and commerce. The list following will give some idea of the use to which the trust has been put in the different states and the diverse character of industry conducted under its organization; citations wherein the various concerns were in litigation are also given:

COTTON MILLS AND PRINT WORKS.

Garner & Company of New York.
Thorn v. DeBreteuil, 179 N. Y. 64, 71 N. E. 470.
Reported under Estoppel.

STREET CAR LINES IN CHICAGO AND INDIANA.

Chicago City and Connecting Railways Collateral Trust.
Venner v. Chicago Ry. Co., 258 Ill. 523, 101 N. E. 949.
Reported under Public Policy.

PATENTS.

Mayo v. Moritz, 151 Mass. 481, 24 N. E. 1083.

HOTEL.

Estate of John Plankinton, Milwaukee.
Upham v. Plankinton, 152 Wis. 275, 140 N. W. 5.

FERRY BOAT.

Whitman v. Porter, 107 Mass. 522.

MANUFACTURING.

Pepperell Manufactory Company.
Malley v. Bowditch, 259 Fed. 809, 7 A. L. R. 608.
Reported under Taxes.

BUILDING AND LOAN ASSOCIATION.

The Great American Home Saving Institution.
State v. Lee, 233 S. W. 20.
Reported under Distinguished from Other Organizations.

FOUNDRY.

Froelich Estate.
In re Froelich Est., 50 Misc. Rep. 103, 100 N. Y. Sup. 436.

TOWN-SITE COMPANY.

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Spotswood v. Morris, 12 Idaho 360, 85 Pac. 1094, 6 L. R. A. (N. S.) 665.

LUMBER AND SALT.

Loud v. Winchester, 52 Mich. 174, 17 N. W. 784.

COLLECTION OF RENTS.

The Wachusett Realty Trust.
Crocker v. Malley, 249 U. S. 223, 63 L. Ed. 573, 2 A. L. R. 1801, 39 Sup. Ct. 270.
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Pittsburgh Wagon Works.
In re Pittsburgh Wagon Works Estate, 204 Pa. 432, 54 Atl. 316.
Reported under Trust Property.

STEAM RAILWAYS.

Caney River Railway Co.
Wright v. Caney River Ry. Co., 151 N. C. 529, 66 S. E. 588, 19 Am. Case 384.
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HARDWARE BUSINESS.

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Hart v. Seymoure, 147 Ill. 598, 35 N. E. 246.

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Rhode Island Hospital Trust Co. v. Copeland, 39 R. I. 193, 98 Atl. 273.
Reported under Trusts Distinguished from Other Organizations.

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Nathan Connally.
Connally v. Lyons, 82 Tex. 664, 18 S. W. 799, 27 Am. St. Rep. 935.
Reported under Liability of Trustees.

ROYALTY ON MACHINES.

McKay Sewing Machine Association.
Gleason v. McKay, 133 Mass. 419.
Reported under Taxes.

REAL ESTATE.

Daggett Building Association.
Howe v. Morse, 174 Mass. 491, 55 N. E. 213.
Reported under Deed of Trust.
Homan's Real Estate Trust.
Priestley v. Burrill, 230 Mass. 452, 120 N. E. 100.
Reported under Trust Property.

OIL.

Davis-Coggins Oil Company.
Davis v. Hudgins (Texas) 225 S. W. 73.
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Texline-Burk Oil Co.
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TRUSTS FOR BUSINESS PURPOSES

CHAPTER I.

DEED OF TRUST.

1—*Definition.*

A trust is an equitable obligation, either expressed or implied, resting upon a person by reason of a confidence reposed in him, to apply or deal with property for the benefit of some other person or for the benefit of himself and another or others, according to such confidence; it is holding of property subject to a duty of employing it or applying its proceeds according to directions given by the person from whom it was derived.[1] Again a trust has been defined as a confidence reposed in one or more persons, by and for the benefit of others, with respect to property held by the former for the others' benefit; the person in whom this confidence is reposed who holds title to the property in question is the trustee, and the person for whose benefit the property is so held by the trustee is the beneficiary—cestui que trust, or as referred to in the Roman law—the fidei-commissarius.[2]

[1] Templeton v. Bockler, 73 Ore. 494, 144 Pac. 405.

[2] Teal v. Pleasant Grove Local Union, 200 Ala. 23, 75 So. 335; Keplinger v. Keplinger, 185 Ind. 81, 113 N. E. 292.

In its technical sense, a trust is the right, enforceable solely in equity, to the beneficial enjoyment of property, the legal title of which is vested in another and implies separate coexistence of the legal and the equitable titles vested in different persons at the same time; in its more comprehensive sense the term embraces every bailment, every transaction by agent or factor, every deposit, and every matter in which the slightest trust or confidence exists.[3] The word trust, however, is frequently employed to indicate duties, relations, and responsibilities which are not strictly and technically trusts.[4]

2—Formality in Creating.

No particular formality is necessary in the creation of a trust; any agreement or contract in writing made by the person having the power of disposition of property, agreeing or directing that a certain fund or parcel of property be held or dealt with for the benefit of others, raises a trust in favor of such others against the person making the agreement.[5] Nor is it necessary in order to declare a trust, that the words 'trust' and 'trustee' or equivalent words be used where the intention to create a trust clearly appears from the language actually employed.[6] This was also the rule at common law;[7]

[3] Bowes v. Cannon, 50 Col. 262, 116 Pac. 336.

[4] Holsapple v. Schrontz, 65 Ind. App. 390, 117 N. E. 547.

[5] Richards v. Wilson, 62 Ind. App. 4, 112 N. E. 730; St. Catherine's Cemetery v. Fidelity Trust Co., 152 Ky. 797, 154 S. W. 29; Wood v. Owen, 133 Ga. 751, 66 S. E. 951; Austin v. Wilcoxson, 149 Cal. 24, 84 Pac. 417.

[6] In re Soulard's Estate, 141 Mo. 642, 43 S. W. 617; Taber v. Bailey, 22 Cal. App. 617, 135 Pac. 975; Moulden v Train, 199 Mo. App. 509, 204 S. W. 65; Pembroke Academy v. Epsom School Dist., 75 N. H. 408, 75 Atl. 100; Teal v. Pleasant Grove Local Union, Supra; Laws v. Christmas, 178 N. C. 359, 100 S. E. 587.

[7] Smith v. Smith (Ky.), 121 S. W. 1002.

the instrument, however, should be clear and concise as to parties and object.

While the foregoing is the general rule as to the formality in creating a trust, some states have statutory provisions for the establishment of express trusts and these statutes should be conformed to strictly.[8]

3—*Must be Written.*

It is a well settled rule of law that a trust of personal property may be created by parol and its existence proved by oral testimony, but the evidence must be clear and explicit as to the subject-matter, parties, and purpose, and leave no room for a reasonable doubt that a trust is intended.[9] Express trusts concerning real estate must be in writing to satisfy the statute of frauds.[10] Business trusts which may own personal property, or real estate, or carry on commerce and trade, should, without doubt, be in writing; trusts created by the direct and positive act of the parties by some writing or deed or will, directly and expressly pointing out the property, persons, and purposes of the trust, are called direct or 'express' trusts.[11]

[8] Koehler v. Koehler (Ind.), 121 N. E. 450.

[9] Carroll v. Woods, 132 Mo. App. 492, 111 S. W. 885; Wiehteuchter v. Miller, 276 Mo. 322, 208 S. W. 39; St. Catherine's Cemetery v. Fidelity Trust Co., Supra; Citizens' Natl. Bank v. McKenna, 168 Mo. App. 254, 153 S. W. 521.

[10] Moulden v. Train, Supra; Nolan v. Guggerty, 187 Ia. 980, 174 N. W. 706; In re Mahin's Estate, 161 Ia. 459, 143 N. W. 420.

[11] St. Catherine's Cemetery v. Fidelity Trust Co., Supra; U. S. Fidelity Co. v. Smith, 147 S. W. 54.

4—For What Purposes May be Created.

The owner of real estate can specifically appropriate rents and profits to a named purpose, or create a trust in them separate and apart from the title to the real estate;[12] or the property itself may be the subject of a trust just the same as personal property; there seems to be no limitation on property, personal or real, or other property rights that may be the subject of a trust.[13] Any right, interest or thing which may be the subject of property, or which the law recognizes as valuable, may be granted or transferred in trust.[14] The law recognizes the right of the owner of property to deed it in trust, it also protects the trust property in all business, commerce and trade which is not contrary to law. The general rule is that a trust may be created for all purposes for which an individual may use property or property rights.

5—Consideration.

For ordinary purposes it is unnecessary to the validity of a declaration of trust for it to be based on a consideration passing to the trustee; for upon delivery of the declaration of trust a perfect and complete trust is established which will be enforced, although voluntary.[15] This rule applies only where the trust is created by voluntary disposition and is a completed transaction.[16] The common-law rule was that a consideration was

[12] Gisborn v. Charter Oak Life Ins. Co., 12 Sup. 277.

[13] Haulman v. Haulman, 164 Ia. 471, 145 N. W. 930.

[14] Burke v. Burke, 259 Ill. 262, 102 N. E. 293.

[15] Schumacher v. Dolan, 154 Ia. 207, 134 N. W. 624; Taber v. Bailey, 22 Cal. App. 617, 135 Pac. 975; Nichols v. Emery, 109 Cal. 323, 41 Pac. 1089.

[16] Reynolds v. Thompson, 161 Ky. 772, 171 S. W. 379; Fisher v. Hempton Transp. Co., 136 Mich. 218, 98 N. W. 1012.

necessary in a deed of bargain and sale in order to prevent a resulting trust; however, this has been abolished by statute in most of the states.[16½]

Where a trust deed recites a valuable consideration, contains apt words of conveyance, is under seal, and is delivered to the trustee who receives the deed and agrees to carry out all the trusts therein stipulated, the legal title to the property—as between the parties—passes to the trustee even without delivery.[17] When a valuable consideration exists between an alleged trustee and beneficiary, a court of equity may deem a contract to declare a trust as equivalent to an actual declaration.[18]

6—*Elements.*

While no particular words are necessary to create a valid trust, the writing of the trustor must, however, express a declaration or grant by him of an estate or interest containing all the essential elements of a trust.[19] These essentials of a valid trust are (1) sui juris trustor, (2) a designated beneficiary, (3) a designated trustee, (4) a fund or property so distinguished as to pass title to the trustee,[20] (5) the necessary writing stating the object of the trust. In addition to the necessary elements, the trustor must do everything that can be done

[16½] Campbell v. Noble, 145 Ala. 233, 41 So. 745.

[17] Kelly v. Snow, 185 Mass. 288, 70 N. E. 89.

[18] Austin v. Young, 90 N. J. Eq. 47, 106 Atl. 395.

[19] Northrip v. Burge, 225 Mo. 641, 164 S. W. 584; Bay Biscayne Co. v. Baile, 73 Fla. 1120, 75 So. 860; Floyd v. Smith, 59 Fla. 485, 51 So. 537; City of Austin v. Cahill, 99 Tex. 172, 88 S. W. 542.

[20] Brown v. Spohr, 87 App. Div. 522, 84 N. Y. Sup. 995; Kahn v. Tierney, 133 App. Div. 897, 120 N. Y. Sup. 663; Conley v. Daughters of Republic (Tex.), 156 S. W. 197; Central Trust Co. v. Gaffney, 157 App. Div. 501, 142 N. Y. Sup. 902.

—the character of the property comprising the trust being considered—to transfer the property to the trustee in such mode as will effectually pass title.[21] Acceptance of a trust is essential to the vesting of title in the trustee.[22] The signing by the trustee of a deed creating a trust and his acknowledgment of the same, constitutes a complete acceptance of the trust.[23]

The trustee's signature may be made by initials and may be placed on any part of the declaration of trust, providing he signs for the purpose of giving authority to the instrument.[24] The better rule, however, is for the trustee to sign his full name in the proper place on the instrument. The trust is said to be executed when no act is necessary to be done to give it effect.[25]

7—Construing Trust Instrument.

Though no particular form of words or the use of the words 'trust' or 'trustee' is necessary to create a trust, the intention to create it must be clear and the writing must be reasonably certain with reference to the subject-matter, the beneficiaries, the nature and quantity of their interests, and the manner in which the trust is to be performed.[26] It has been said also that the creation of a trust does not depend upon the use of any particular language or form of expression, but upon the meaning of the language employed when fairly construed in the light of the circumstances, relation, and situation of the parties; if

[21] State v. Ellison, 216 S. W. 967; Loring v. Hildreth, 170 Mass. 328, 49 N. E. 652.

[22] Brandon v. Carter, 119 Mo. 572, 24 S. W. 1035.

[23] Dayton v. Stewart, 99 Md. 643, 59 Atl. 281.

[24] McVay v. McVay, 43 N. J. Eq. 47, 10 Atl. Rep. 178.

[25] Massey v. Huntington, 118 Ill. 80, 7 N. E. 269; State v. Ellison, 216 S. W. 967; Skeen v. Marriott, 22 Utah 73, 61 Pac. 296.

[26] Otjen v. Frohbach, 148 Wis. 301, 134 N. W. 832.

the intent to create a trust is clear and the essential elements may be fairly deduced from the language employed, the trust will not fail for the lack of more adequate expression.[27]

The modern and better rule is that the intention to create should be set forth clearly; there should be no room for doubt in the language used in the instrument of trust which is to be used for business purposes.[28] Where the meaning of a contract is doubtful, the fact that the parties thereto adopt a particular construction and for many years acquiesce in and act upon it, should lead a court without hesitation to adopt that construction as the proper one.[29] Where the language of a trust is ambiguous, it must, if possible, be construed in favor of the beneficiaries and against the trustee.[30] The court in construing a trust must look to the instrument creating it and construe it subject to the rules governing the interpretation of contracts.[31] The court, in determining whether a trust or a partnership is created, will consider what the parties did and will not consider what they intended to do, unless there is a doubt as to what they did.[32] If the words of a trust deed are plain and unambiguous, there is no necessity for judicial interpretation.[33] The law of the place where the trustor resided at the time of the execution governs the construction of a trust.[34] Whether a trust is created or not is a question of fact in each

[27] Holsapple v. Schrontz, 65 Ind. App. 390, 117 N. E. 547; Cahlan v. Bank of Lassen Co., 11 Cal. App. 533, 105 Pac. 765; Carr v. Carr, 15 Cal. App. 480, 115 Pac. 261.

[28] Skeen v. Marriott, supra.

[29] Nickerson v. Atchison T. & S. F., 17 Fed. 408.

[30] Ringrose v. Gleadall, 17 Cal. App. 664, 121 Pac. 407.

[31] Ringrose v. Gleadall, supra.

[32] Williams v. Inhabitants of Milton, 215 Mass. 1, 102 N. E. 355.

[33] Crown v. Cohn, 88 Ore. 642, 172 Pac. 804.

[34] Curtis v. Curtis, 185 App. Div. 391, 173 N. Y. Sup. 103.

case and the court in determining the fact will give effect to the situation and relation of the parties, the nature and situation of the property, and the purpose or object which the settlor had in view in making the disposition.[85]

One of the leading cases on the construction of a trust instrument is Haulman v. Haulman;[86] in this case Harry Haulman gave $2500. in trust and the same day executed a will (copies of both instruments will be found in the Appendix). Upon his death his wife in a petition sought to declare the trust invalid and asked that the property transferred in trust be declared a part of the estate. The court held that the trust was valid; that the property had passed irrevocably to the trustees; that a person had a right to dispose of property in trust either by will or deed; that the declaration of trust affected only such property as was delivered to the trustees; that the petition was wrongfully brought and was properly dismissed. The points in the case are discussed in the decision which in substance is as follows:

8—*Trustees Take Title at Time of Execution and Delivery.*

The plaintiff was the widow of one Harry Haulman; the defendants were the executors of his will. The action was brought by the plaintiff to have the defendants removed as executors of the will on the ground that they had in their possession a certain sum of money received by them from Harry Haulman before his death, as she alleged under some sort of an arrangement between them, by which they were to pay to the deceased interest upon the money held by them; that they failed to account for the same as any portion of the estate; that they filed an inventory of the personal property of the

[85] Lynn v. Lynn, 135 Ill. 18. [86] 164 Ia. 471, 145 N. W. 930.

said Harry Haulman and therein made no mention of the money so received and held by them. The defendants answered plaintiff's petition by setting forth that the money so held by them was no part of the estate of Harry Haulman but was a trust estate; that the will executed by Harry Haulman at the time of the execution of the trust instrument was duly probated and that the plaintiff elected to take her distributive share in the estate of the said Harry Haulman. The plaintiff then filed the following motion: "And now comes Mary C. Haulman, widow of Harry Haulman, deceased, and upon the answer of executors to petition of Mary C. Haulman for their removal, and the admissions in said answer contained, moves this honorable court to order, adjudge, and decree that said Mary C. Haulman is entitled to a one-third interest in all the property of said Harry Haulman, including the $2,500 in said answer mentioned, and that the said executors be required to amend their inventory filed herein so as to include said $2,500 therein."

The motion was denied; the court especially finding that the $2,500, with its accumulations, mentioned in the trust deed, was no part of the estate of Harry Haulman, and that the plaintiff was not entitled to participate therein. From this order, the appeal was taken.

The appellant relied upon five points for reversal:

(1) There was no executed gift by virtue of the trust instrument, for an executed gift is inconsistent with the declaration of trust.

(2) A trust instrument vests in the trustees only such estate as is necessary to enable them to execute the trust.

(3) Equity will not interpose to perfect a defective gift or voluntary settlement.

(4) The instrument was not executed in compliance with the statute governing wills, and therefore was ineffective as a

testamentary disposition of property. It was equally ineffective to evidence a gift inter vivos.

(5) The fact that in the will testator required the trustees to "keep and care for my property the same as I have this day directed them to do in an article of trust and that they follow out the provisions of said trust fully, and, at the end of five years from my decease that they make an equal distribution of my property to my children," does not make the trust instrument a part of said will, and so give to said instrument vitality as a testamentary disposition of property. The court, in disposing of the points raised by appellant, in substance said that a proper determination of the controversy involved a construction of the declaration of trust and the will; the rights of the parties to the money in controversy had to be determined from a consideration of these instruments alone.

There is no question but that any property, real or personal, may be transferred and conveyed by the owner to a trustee, to be held by the trustee for the use and benefit of others; that the owner of property may transfer the legal title to another, to be held, controlled, and managed by the other for the use and benefit of others designated by him.

It is true that, where the use and benefit and enjoyment of the thing conveyed is deferred until after the death of the owner, and where, by the terms of the instrument, the conveyance does not become effectual until after the death of the grantor, and the legal title remains in the grantor until such time, the instrument is, of necessity, testamentary in its character, and can be enforced only as such.

To make it effectual, the instrument of conveyance must operate in praesenti. It must transfer the title, dominion, and control over the thing to the trustee at the time of its execution and delivery, and, when this is done, the enjoyment of the thing

conveyed may be postponed until after the death of the grantor, or postponed to any future time. The benefits to be derived from the grant may be postponed, without the instrument losing any of its efficiency as a trust instrument, or without affecting, in the least, the trust character of the conveyance. In all instruments where a trust is created in one for the use and benefit of another, the party creating the trust must release all power of disposition over the fund.

9—*Who May Create.*

It is fundamental law that any person of lawful age and sound mind has a legal right to turn over personal property of whatever character into the hands of another, to be held and used for the benefit of some person designated therein as beneficiary, and that, when this is done, whether by written instrument or parol, the beneficiary obtains an immediate and vested interest in the subject of the trust, and the party creating the trust cannot revoke or disaffirm the same, unless such power of revocation has been reserved, in express terms, at the time of the creation of the trust. The owner of personal property has the absolute right to dispose of it to whomsoever he sees fit, with or without consideration and subject only to those limitations as to creditors, and such a disposition, when fully consummated, becomes binding upon him and upon all claiming by, through, or under him.[37]

As said in Cameron v. Cameron:[38] "In a case of this kind the only inquiry need be whether the deed of the husband is

[37] Jones v. Nicholas, 151 Iowa 362, 130 N. W. 125; Love v. Blauw, 61 Kan. 496, 59 Pac. 1059, 48 L. R. A. 257, 78 Am. St. Rep. 334; Forney v. Remey, 77 Iowa 549, 42 N. W. 439; Lewis v. Curnutt, 130 Iowa 423, 106 N. W. 914.

[38] Reported in 10 Smedes & M. (Miss.) 394, 48 Am. Dec. 759.

absolute and irrevocable or not. It is the undoubted right and privilege of a husband to dispose of his personal estate in any manner he thinks proper in his own lifetime, and thus to cut off his widow from dower in such property; and a voluntary conveyance will be good against the claims of the widow."

10—*Trust May Be Created By Will or Deed.*

In determining whether an instrument is a deed or a will, the main question is: Did the maker intend to convey an estate or interest that should vest before his death, and immediately upon the execution of the instrument, or did he intend that all the interest and estate affected by the instrument should pass only after his death? If the instrument passed a present estate, and passed the title and right to possession to the property involved, immediately upon its execution to the trustee named therein, it is effectual, although the enjoyment of the thing conveyed in the parties named as beneficiaries is postponed to a future date. All that is necessary is that the donor or grantor should have absolutely parted with his interest, and have effectually put such interest beyond his reach.[39]

In Re Estate of Podhajsky,[40] it is said: "It is immaterial whether we call the transaction now under consideration (and we might remark this is a case very much like the one at bar) a gift by the deceased to his daughters, or a trust established by him for their benefit. Indeed, a voluntary trust is simply a device by which a donor effectuates a gift, either of property or of its beneficial use and enjoyment, to a designated donee.

[39] Vosburg v. Mallory, 155 Iowa 165, 135 N. W. 577; Lane v. Ewing, 31 Mo. 75, 77 Am. Dec. 632. See also, Wilson v. Carrico, 140 Ind. 533, 40 N. E. 50, 49 Am. St. Rep. 213.

[40] 137 Iowa 742, 115 N. W. 590.

Even a gift causa mortis may be effected by delivery to a third person in trust for the donee, although the gift does not come to the knowledge of the donee, and is not accepted by him until after the death of the donor. The acts of the trustee or third person receiving the property for the benefit of the donee are deemed to be in the interest of the latter, and the acceptance of the gift is presumed."[41]

It has even been held that a reserved power in the grantor to recall the grant which has not been exercised during the life of the grantor, does not destroy the effectiveness of the grant.[42]

In Lewis v. Curnutt, supra, the court said: "The same purpose to direct and control the disposition of property beyond the life of the owner is very frequently accomplished through a trustee who may be appointed by will, or by deed, or by other suitable declaration of trust. Subject only to the condition that the purpose of the trust be not in contravention of the command or policy of the law, the right and power of the owner of property to thus dispose of it is elementary."[43]

The general rule is that one may do with his property as he pleases. He may dispose of it by will in any way that suits his fancy or his judgment. He may give it all to a stranger and thus disinherit his relatives. He may give it all to natural persons or to corporations capable of taking. He may give it directly, or create trusts which the law allows; and this general power of disposition he possesses down to the last hour of conscious, intelligent existence. Whether the trust be created

[41] Clough v. Clough, 117 Mass. 83; Gerrish v. Institution, 128 Mass. 159, 35 Am. Rep. 365. See also, Dettmerr v. Behrens, 106 Iowa 585, 76 N. W. 853, 68 Am. St. Rep. 326.

[42] Lippold v. Lippold, 112 Iowa 134, 83 N. W. 809, 84 Am. St. Rep. 331; Newton v. Bealer, 41 Iowa 334.

[43] Hollis v. Drew Seminary, 95 N. Y. 166.

by will or by deed, if it be lawful—and the intent can be fairly ascertained from the examination of the instrument—the courts will uphold and enforce it, for the intent of the settlor in the creation of trusts is what the courts look to, and that intent is to be carried into effect, unless it contravenes some public policy of the law. It is further said in Lewis v. Curnutt, supra: "Moreover, it must be remembered that it is not necessary in any case to the establishment of a trust that any beneficial interest shall pass to the trustee. From its very nature, a trust involves the idea of a separation of the beneficial interest from the legal title. When a trust is executed by the delivery of a simple conveyance to the trustee, that act and instrument serve to pass an immediate present interest to the cestui que trust, no matter how far in the future the enjoyment of the benefit thus provided may be deferred."

11—*Trust Distinguished from a Gift.*

In Forney v. Remey,[44] it was expressly decided that one owning property, real or personal, may transfer and convey the same to a trustee, to be held for his own benefit, or for other beneficiaries. The instrument in this Forney Case, upon its face, was a conveyance in trust for the benefit of the grantor and others who were named as beneficiaries upon the face of the instrument. The instrument assigned, transferred, and conveyed certain accounts and personal property to a certain person named as trustee, a schedule of which was attached. Following the naming of the trustee, and the transfer of the property in the instrument set out, the trustor made provision that the trustee named in the instrument should hold the property, and, after deducting from the interest, rents, income, and

[44] 77 Iowa 549, 42 N. W. 439.

profits any expense attending the execution of the trust, the trustee should pay to the trustor all the interests, rent, and income, and profits arising from such property, such payments to be made during her natural life, and at the death of the donor or trustor the property to be distributed among those named therein as beneficiaries. The court said: "The plaintiff's counsel insist that the instrument witnesses a gift inter vivos * * * is not valid, for the reason that it is testamentary in its character. It is plain that the conveyance is not a gift inter vivos. The grantor herself is named as the first beneficiary, retaining the power to direct the investment of the funds arising from the property. The other beneficiaries can, under the instrument, receive no benefits from the property until after the death of the grantor. Nothing further need be said in order to refute utterly plaintiff's position that the instrument witnesses a gift inter vivos." Further: "The property, under the instrument, passes to the defendant, who takes it as a trustee, and holds it subject to the terms of the trust. The title passes—in praesenti; it does not await the death of the grantor. She lost ownership and control of the property by the execution of the deed. There is nothing in the conveyance suggesting an idea of a future power of disposition retained by the grantor. She could not revoke the grant, nor in any way change its terms and conditions."

Many more cases might be cited in support of the defendants' claim; but the court did not deem it necessary to make reference to them, for the reason that every question raised in the case had been fully and fairly met and decided by the court, and each case was amply supported by well-considered cases from other states.

The question in this case then is: Do the instruments herein relied upon meet the requirements of the law as hereinbefore

stated? The instrument under consideration provides: "I will place in the hands of my two sons, H. E. Haulman and B. T. Haulman, the sum of $2,500.00." It appears that on the date of the execution of this instrument he did place $2,500 in the hands of these two sons. It appears that he placed this money in their hands as trustees, not only of that sum, but any and all other sums that might be added to it; that he placed it in trust with them for the use and benefit of his children named in the instrument.

Harry Haulman, the creator of the trust, had, at the time the instrument was executed, $2,500 in money; he paid this money to the defendants, to be held by them in trust for his children; by the instrument, he created them trustees of the fund, and retained no control over the fund, no right to withdraw it from their hands, or direct its disposition other than is shown in the instrument creating the trust. This money, so delivered to these trustees, was never withdrawn by Harry Haulman, and was in the hands of the defendants, as trustees, under the trust instrument, at the time this action was commenced. It is true that in the instrument he directed his trustees as to the management of the fund, but assumed no control over the management of it himself, and directed his trustees, upon his death, to distribute the fund to the beneficiaries named in the trust deed, as therein provided.

It is true that the trust deed and the will undertake to dispose of and control property not shown to have been in existence at the time of the making of the trust deed and will, and property which does not appear to have ever been delivered by him to the trustees. This does not affect the trust character of the property in controversy, which was, in fact, delivered to and retained by, the trustees under the trust deed, and which is the property in controversy here. The will in no way changes

or attempts to change the disposition of this fund in the hands of the trustees. Nor is it in any way inconsistent with the provisions of the trust deed.

Thus a proper construction of this instrument shows that the property in controversy under the instrument in question passed to these defendants as trustees; that they took it, and were holding it at the time this action was commenced, subject to the terms of the trust; that the title to this money passed to these trustees immediately upon the execution and delivery of the trust deed and the property; that the maker of the trust deed retained no personal control over the property after the execution of the instrument and the delivery of the same to the trustees; that, by the execution and delivery of the deed and the property to these trustees, he then lost ownership and control of the property. The instrument itself suggests that he retained no power over the property that would enable him, in the future, to make any other different disposition than was provided for in the instrument. He could not revoke it, or in any way change its terms and conditions. The legal title passed to the trustees. The beneficial interest passed to his children. Both the legal title and the beneficial interest passed, upon the delivery of the instrument and the other property, to the trustees, and the instrument itself shows that that was his purpose and intent. He had a legal right to make the instrument at the time. He had a legal right to transfer the property direct, if he chose, to the beneficiaries named therein. If he had done so, no question could possibly have arisen such as we have before us now. He chose, however, to pass the legal title to these defendants, and the beneficial interest to the beneficiaries named in his deed. Having parted with both, nothing remained in him, at the time of his death, that could possibly pass to his executors under the will.

The cases cited by counsel for appellant fail to support their position that the instrument in question is not a trust deed, operating in praesenti. The instrument itself, upon its face, under the holdings of this court heretofore referred to, shows that the instrument is not a testamentary writing, and does not witness a gift inter vivos. Without reviewing the cases cited by appellant, we are satisfied with the holdings of this court heretofore made, which an examination shows are amply supported by the best authority.

The court decided that the trust was valid; that the lower court properly dismissed the plaintiff's petition.

12—*Amendment.*

When once a trust has been effectually created, it cannot afterwards be altered or revoked by the person who created it;[45] nor can the trustees or the court, to promote better the interests of the beneficiaries, change or alter the trust, because the judgment of the settlor in respect to the matter is the law of the trust;[46] nor can the trustees by subsequent declarations or agreements modify, vary, or amend the original trust, if the trust instrument does not provide for such modification.[47] While all the parties in interest—providing they are of legal age—may terminate the trust, they have the same right to vary, amend and modify as in any other contract.[48]

The general rule is that once a trust is created and put into operation, it cannot be amended, this does not apply where the

[45] Skeen v. Marriott, 22 Utah 73, 61 Pac. 296.

[46] Upham v. Plankinton, 152 Wis. 275, 140 N. W. 5.

[47] Burling v. Newlands, 112 Cal. 476, 44 Pac. 810.

[48] Klugh v. Seminole Securities Co., 103 S. C. 120, 87 S. E. 644. See Trust Estates—Sears 2nd. Ed. 370-97. See Note 47 L. R. A. 136 for amendments to beneficial associations.

instrument itself specifically provides for amendments. A person with power to create, without doubt, may provide for amendments necessary to carry out the spirit of the trust so long as no vested rights under the trust are affected or impaired. The trust agreement may provide that amendments be made by the trustees and ratified by all or by a majority of them; or it may provide that amendments be made by the trustees and ratified by two-thirds or a majority of the shareholders. A great number of trusts have been before the courts which had provisions in them for modification or termination of the instrument by a majority or two-thirds of the shareholders. In one there was a provision that two-thirds of the shareholders by a vote at a meeting called for the purpose, might sooner terminate, or renew the trust.[49] In another it was provided that with the written consent of a majority in interest of the beneficiaries, a vacancy among the trustees might be filled, or the trust itself might be modified.[50]

13—*Notice—Recording.*

The object in recording an instrument is to give notice to all people of the interest and rights one has in reference to the document recorded. The acts of the state in which a trust has its principal office would be the determining factor in recording the declaration of a trust organized solely for the purpose of dealing in and holding personal property. If there is any provision in a trust for the present or future holding of or dealing in real estate, it must be recorded the same as any other deed. People have the right to know, and should know, with

[49] Davis v. Hudgins, (Tex.) 225 S. W. 73.

[50] Crocker v. Malley, 249 U. S. 223, 63 L. Ed. 573, 2 A. L. R. 1601, 39 Sup. Ct. 270.

whom they are dealing; and for that reason the trust instrument in limiting the liability of the trustees should provide for actual notice to all people who contemplate doing or actually do business with the trust. This actual notice should be brought home to all parties by a clause in the trust itself, and all contracts and documents should specifically state that the trustees act in their trust capacity only. Where the act does not definitely provide for recording, it is not sufficient notice to third parties to record the declaration of trust; personal notice should be given in addition. The question of personal notice cannot be overly emphasized; the rule is to record the declaration of trust and also provide for personal notice to all parties who deal with the trust through its trustees.

14—*Seal—Definition and History.*

A seal is the impression made on a document by an instrument such as an engraved metallic plate. At common law and in earlier times, a seal meant an impression made on wax or other material which would take and retain an impression. Seals were introduced by the Normans and used in fact as a signature at a time when each man had his signet and escutcheon with engraving designating the individual. Lord Coke said a seal was wax with an impression; when this was true in the early part of the seventeenth century, the question of seal or no seal, deed or no deed, was matter to be decided by inspection. In process of time other materials than wax were used, but the impression was still considered as important and its existence was still to be tried by inspection. Later, the scroll seems to have been used habitually as a seal, even before statutes on the subject.[51]

[51] Cromwell v. Tate, 7 Leigh (Va.) 301, 30 Am. Dec. 506.

The right on an individual to use a seal has never been challenged,[52] the decisions universally assume that where the individual adopts and uses a seal it is done as a matter of right. The trustee being an individual and a citizen,[53] unquestionably has the right to adopt and use a seal; once a seal has been used the presumption is that the use is lawful.[54] If the trustee contemplates the use of a seal, the declaration of trust should especially provide for such use. The sealing of an instrument is a prima facie evidence that it has been duly executed; that the seal was used by the proper officers is not conclusive as it may be shown that it was not affixed officially.[55] As to informal documents, the use of the seal has been abolished by statute in nearly all of the states; for that reason the statute of the state in which the trust is to maintain its home office, should be consulted in the drawing of a declaration of trust.

15—*Termination of Trust.*

(a) *By Instrument.*

Usually the life of a trust should be provided for in the instrument together with the manner and time of termination—the latter not to violate the rule of perpetuities. Where the instrument recites the time of expiration and it is not in violation of law, the court cannot, before expiration of the term of a trust, decree dissolution without consent of all parties in interest.[56] It is a general rule that a valid trust in property created with intention expressed or necessarily implied that it

[52] Johnson v. Crawley, 25 Ga. 316, 71 Am. Dec. 173.

[53] See Chapters on Interstate Commerce and Validity.

[54] Mullanphy v. Schott, 135 Ill. 655, 26 N. E. 640, 25 A. S. R. 401.

[55] 24 R. C. L. 695.

[56] Metcalfe v. Union Trust Co., 87 App. Div. 144, 85 N. Y. Sup. 183.

shall endure for a specified time and for specified objects, is due to be carried out according to such intent.[57]

(b) *By Trustor.*

As a general rule the trustor loses control over the property deeded in trust, and his right, powers and duties as such donor are at an end when the trust is complete. The fact that a deed creating a trust contains no power of revocation, and is without consideration and voluntary, is not sufficient grounds for setting it aside at a suit of the trustor.[58] In a suit by a settlor to set aside a deed creating a trust which contains no power of revocation, evidence should be conclusive to show that the absence of a power of revocation was due to a mistake or misunderstanding on the part of complainant;[59] for once a trust has been effectually created, it cannot afterwards be altered or revoked by the person who created it.[60]

(c) *By Trustees.*

Where a trust has been created and a trustee appointed and given possession of the trust estate, the trust cannot be destroyed by the failure or omission of the trustee to perform all of his duties promptly. Acts of omission of the trustee in performing the details of the trust will not destroy it.[61] The trustees have no right or power to terminate the trust; but where the trust has been legally terminated, the trustee may

57 Upham v. Plankinton, 152 Wis. 275, 140 N. W. 5.

58 Dayton v. Stewart, 99 Md. 643, 59 Atl. 281.

59 Dayton v. Stewart, Supra.

60 Skeen v. Marriott, 22 Utah 73, 61 Pac. 296.

61 Bay Biscayne Co. v. Baile, 73 Fla. 1120, 75 So. 860.

invoke the jurisdiction of equity to partition the property among the beneficial owners.[62]

(d) *By Beneficiaries.*

An active trust which requires the exercise of discretion by the trustee, cannot be terminated at the will of the beneficiaries;[63] but if all the parties interested in the trust property are sui juris, the trustees and beneficiaries may, by agreement, terminate the trust.[64] This rule, of course, would not apply where any of the parties are under disability, or where the settlor makes known, expressly or plainly, his intention that such power should not exist;[65] or where some of the parties are infants.[66]

(e) *From Other Cause.*

Regardless of the nominal duration of an estate given to a trustee, it continues in equity no longer than the thing sought to be secured by the trust demands. When that demand has been fully satisfied, and although the trust may not have ceased by expiration of time, if all the parties who are or who may be interested in the trust property are in existence and are sui juris and they agree thereto, a court of equity may decree the termination of the trust.[67] The termination or satisfaction of a trust may be presumed from lapse of time or gross laches in its enforcement amounting to acquiescence.[68] No trust can

[62] Rackemann v. Tilton, 236 Ill. 49, 86 N. E. 168.

[63] Easton v. Demuth, 179 Mo. App. 722, 162 S. W. 294.

[64] Cowie v. Strohmeyer, 150 Wis. 401, 136 N. W. 956.

[65] Cowie v. Strohmeyer, Supra.

[66] Anderson v. Williams, 262 Ill. 308, 104 N. E. 659.

[67] In Re Stafford's Estate, 258 Pa. 595, 102 Atl. 222.

[68] Jones v. Haines, 79 N. J. Eq. 110, 80 Atl. 943.

survive the purpose of its creation, when that is accomplished it must, of necessity, terminate.[69]

16—*Rule Against Perpetuities.*

A perpetuity is defined to be a limitation taking the subject thereof out of commerce for a longer period of time than a life or lives in being and twenty-one years beyond, and, in case of a posthumous child, a few months more—allowing for the time of gestation. Gilbert, in his treatise on Uses, defines it to be such a limitation of property as renders it inalienable beyond the period allowed by law. Lewis, in his treatise on Perpetuities, defines it to be "a future limitation, whether executory or by way of remainder, and of either real or personal property, which is not to vest until after the expiration of, or will not necessarily vest within, the period fixed and prescribed by law for the creation of future estates and interests, and which is not destructible by the persons for the time being entitled to the property, subject to future limitation, except with the concurrence of the individual interested under that limitation."[70]

The true object of the rule against perpetuities is to prevent the creation of interests on remote contingencies. Its effect in removing restrictions on the immediate conveyance of property is only an incident. It is not the alienability of an interest dependent on a remote contingency, but its utterly uncertain value, which furnished the sufficient justification, if it was not the original ground, of the rule against perpetuities. If there is a

[69] Kahn v. Tierney, 135 App. Div. 897 Sup. Ct., 120 N. Y. Sup. 663; Winters v. March, 139 Tenn. 496, 202 S. W. 73.

[70] Waldo v. Cummings, 45 Ill. 421; Hart v. Seymour, 147 Ill. 598, 35 N. E. 246.

gift over of an estate on a remote contingency, the market value of the interest of the present owner will be greatly reduced, while the executory gift will sell for very little; or in other words, the value of the present interest plus the value of the executory gift will fall far short of what would be the value of the property if there were no executory interest.[71]

In the case of Edgerly v. Barker, in discussing the rule against perpetuities, the court in substance said that while the reasons for the rule are not fully stated generally, its application may require a wide view of public policy, including the legal nature and design of property, the reasonable extent of any owner's posthumous control, and the economic and moral effects of realty and personalty being largely held in trusts of long duration for mere accumulation or for purposes of entailment. Divers evils could be materially increased and unduly perpetuated if the law allowed long-continued accumulations of estates in trust for future private use, or appropriations to maintain grantees or legatees and their heirs forever or for many generations, without effort or care on their part and without ability to waste or lose the capital devoted to their support.

The most universal and effectual way of abandoning property is by death of the occupant, when—both the actual possession and intention of keeping possession ceasing—the property, which is founded upon such possession and intention, ought also to cease; for, naturally speaking, the instant a man ceases to be, he ceases to have any dominion; else if he had a right to dispose of his acquisitions one moment beyond his life, he would also have a right to direct their disposal for a million of ages after him, which would be highly absurd and incon-

71 Edgerly v. Barker, 66 N. H. 434, 31 Atl. 900, 28 L. R. A. 328.

venient. All property must therefore cease upon death, considering man as absolute individuals and unconnected with civil society.

17—*Purpose of Rule.*

In the same case in a further discussion of Perpetuities, the court said that whatever may have been the origin of proprietary rights, the power of grantors and testators to control the tenure, possession, use and alienation of property after it ceases to be theirs is one of the subjects on which the interests of society are sufficiently clear and strong to be evidence of common law. By that law an owner's imposition of unreasonable restrictions upon the legal and equitable titles of his successors is not one of the rights of which property consists; and the common-law elements of ownership are not extinguished by a statute conferring or regulating the power of alienation by deed or will. An inability to postpone the vesting of an estate for an unreasonable time is one of many instances of a proprietor's loss of control when he parts with his title. The rule against remoteness is not a detached doctrine, but a broader principle applied to the creation of remote interests.

The policy of the law, where a man dies leaving an infant son, restrains alienation until such infant attains twenty-one; and as such infant may not be born until nine or ten months after the death of its father, the power of alienation is, of course, suspended during that period. As the law imposes such suspension of the power of alienation on the infant, so it will permit such suspense by the owner for a like period, for whether it arises from the act of the law or of the party, the effect will be the same in relation to the interest of the public in the property which is what is consulted in the doctrine of

perpetuities.[73]

Estates may be unalienable for lives in being and twenty-one years merely because a life may be an infant or an en ventre sa mere.[73] The established length of time during which the vesting may be suspended is during a life or lives in being, the period of gestation, and the infancy of such posthumous child; the twenty-one years are introduced to provide for the minority of a child born, and a few months are allowed to let in a posthumous child.[74] Taylor v. Biddall[75] is one of the first cases reported in which so great an excess as twenty-one years after a life or lives in being was allowed. That, however, was a case of infancy, and it was on account of that infancy that the vesting was postponed. This case was allowed by and was the foundation of, the decision in Stephens v. Stephens,[76] which was also a case of infancy; it was on account of that infancy that the vesting of the estate was postponed. These decisions, therefore, do not distinctly or necessarily establish the position that a term in gross for twenty-one years, without any reference to infancy, after a life or lives in esse, will be good by way of executory devise; but there is nothing in them necessarily to confine it to cases of infancy. The limit is a life or lives in being, and twenty-one years afterwards, without reference to the infancy of any person whatever. This will not tie up the alienation an unreasonable length of time. In the case of Cadell v. Palmer,[77] it was held that although a period of twenty-one years can be allowed without an infant, a period of nine months cannot be allowed without gestation.

[73] Fearne, Remainders, 321, Powell's note.

[73] Arden, M. R. in Thellusson v. Woodford (1799), 4 Ves. Jr. 227, 337.

[74] Hawley v. Northampton, 8 Mass. 3-38, 5 Am. Dec. 66, Gray-Perpetuities, Sec. 171-6.

[75] 2 Mod. 289 (1677).

[76] Cas. t. Talb. 232 (1736).

[77] 10 Bing. 140-2-4-51 Id. (1833), 1 Clark & F. 372.

A devise to trustees for the support of the testator's children during their lives, the remainder to his grandchildren (born and unborn) when the youngest is forty years old, is an unreasonable suspension of the grandchildren's future estate. The vesting of their remainder can not be postponed beyond the time when the youngest is twenty-one.[78] So the general rule against perpetuity forbids the creation of future interest in real estate which will not necessarily vest within a life or lives in being at the creation of the interest, and twenty-one years thereafter; and the purpose of the rule is to prevent the creation of interest to take effect upon the happening of remote contingencies.[79]

18—*Rule Applies to Trust Estates and Personal Property.*

The rule against perpetuities applies as well to trust estates as to legal estates and trusts for accumulations are confined strictly within the rule. Future equitable interests are subject to the same rule in this respect as similar legal interests.[80] A trust violating the rule against perpetuities may be proceeded against by proper authorities and estopped from further and future business.[81] In the case of Howe v. Morse a bill was filed against the Daggett Building Association,[82] a trust, to declare it void as violating the rule against perpetuity, and for the further reason that it imposed an illegal restraint upon aliena-

[78] Marston v. Carter, 12 N. H. 159-62; Dennett v. Dennett, 40 N. H. 498-503, 43 N. H. 499-501; Wood v. Griffin, 46 N. H. 230-4.

[79] Brown v. Brown, 247 Ill. 528, 93 N. E. 357; Bigelow v. Cady, 171 Ill. 229, 48 N. E. 974, 63 Am. St. 230, (Note) 11 L. R. A. 85.

[80] Howe v. Hodge, 152 Ill. 252, 38 N. E. 1083.

[81] Green v. Pavey, 150 Ill. 513, 37 N. E. 842.

[82] Howe v. Morse, 174 Mass. 491, 55 N. E. 213.

tion. The court in passing on the issues raised said that the plaintiffs were not entitled to a winding up of the trust, and a sale of the property for the trust offended neither as to alienation nor as to perpetuity. The facts and the law handed down by the court are in substance as follows:

"Is this trust void as creating a perpetuity or imposing an illegal restrain upon alienation?" the court asks, and then says that the right of a shareholder to convey his own shares or interests, under the trust, is in no way restricted. It was contended that illegality was found in the circumstance that no sale of the corpus of the trust and no termination of the trust could necessarily occur within the period of a life or lives in being at the time of the creation of the trust and twenty-one years; that the provision that the certificate holders should not have partition of the land and could compel its sale only by a three-fourths vote, worked an illegal restraint upon alienation. The trustees took legal title to allow the association, through its directors, to manage the land and to enjoy its rent and income, and to sell the land free of trusts, at the will of the association, with a further provision for the termination of the trust by vote of the association at any time after July 1, 1895. Leases for more than five years and sales could be made only in accordance with an affirmative vote of three-fourths of the shares, and a like vote was necessary to terminate the trust.

19—*Equitable Interest is in Shareholders.*

The shareholders for the time being had the whole equitable estate in the corpus of the trust, and could at all times sell and transfer their equitable estates at their own pleasure, and the trustee held the legal title in fee in trust to do with the land whatever might be required by the owners of the equitable

estate; which owners had full capacity, at all times and at their own option, to require a sale of the land discharged of the trust, or the immediate termination of the trust after a period of five years and a few days—the owners of the equitable estate being a voluntary association, the beneficial interests in which were represented by shares and the association acting by vote of the shareholders.

That the directions of the association to the trustees are to be given by three-fourths votes, rather than by majority votes, is immaterial, since it can not be said that one is more improbable than the other. Either is a reasonable way of declaring the will of the association, and there is no provision that a vote to sell or to end the trust must be passed within any stated period, or at all. Such a trust for the convenience of an unincorporated association in renting and selling land, under which the land is held for no other purpose; where the income is not accumulated but is distributed as it accrues; where the land is to be sold free of trusts at the will of the association; where the whole equitable interest in the trust is at every moment vested absolutely in those who at that moment are shareholders and never can become vested in any other persons save by act of the absolute owners or by operation of law upon their property and not by force of any limitation contained in the deed of trust—the equitable interests so vested being also constantly vendible by their several owners without let or hindrance as well as subject to their debts and passing like other property upon death by virtue not of the deed of trust but of the general laws governing the disposition of the property of decedents—withdraws no property from commerce and is not within the reason or the terms of what is called the "rule against perpetuities." The trust in this case involves no future limitations, no restraint upon alienation, and no accumulation

either of income or of principal. The provisions by which the trust fund may be at some time held for the benefit of persons not shareholders at its inception, and who may become such at a period more remote than that allowed by the rule, are not future limitations made by the trust deed in the sense in which the word "limitation" is used in speaking of the operation of the rule. If there shall ever be a shareholder other than those in which the whole equitable estate was absolutely vested at the inception of the trust, that shareholder will not take his interest by virtue of a limitation in the trust deed, but because of his succession, by virtue of the general principles of law, to the property of the original shareholder. The new shareholder, with reference to the rule, is in the same situation as a person who, after the expiration of all lives which were in being when a fee or an estate tail was created, and of a further period of 21 years, takes the fee by the operation of the law which makes property vendible by, or descendible from, the owner, and not by virtue of a limitation in the instrument which created the fee.

The entire ownership is never for a moment uncertain or unvested, and at every moment each owner can freely dispose of his property, and at each moment it can be transferred to his creditor by the ordinary processes of the law, and at each moment the trust can be terminated at the will of the owners of the equitable interest. The case is not like any of those relied on by the plaintiffs. The statement that "it is impossible to take in succession forever without a capacity, and a capacity to take in succession cannot be without incorporation," quoted from the case of Sutton's Hospital,[88] is there made of a corporation administering a public charity, it being contended that the incorporation was void because the foundation was not made be-

[88] 10 Coke, 26b.

fore the grant of the letters patent incorporating the hospital, and the statement does not import that perpetual succession cannot exist save in cases of holding by corporations. We see no proper application to the present case of the statement quoted. Carne v. Long,[84] and Carrier v. Price,[85] were gifts to societies whose members took no personal beneficial interest in the property which had to be kept for the purposes of the society and could not be disposed of by the members for the time being. These cases, there being no public charity, were simply private trusts, and the gifts were bad because the members of the society for the time being did not have power to alienate the estate.[86]

It is said that in the case of voluntary societies for whose use land is, in effect, held in perpetuity, as in the case of the inns of court, whenever the number of benchers to whom the fee of the land is conveyed as joint tenants is considerably reduced, the survivors cause the land to be conveyed to all the then living benchers. But the benchers are not expected to use these lands for their personal benefit. The plain purpose is to keep the lands forever for the use of the voluntary association as a society charged with certain duties and enjoying certain rights, connected in a general way with the administration of the law, and which is inconsistent with any personal interest in, or control over, the land on the part of the individual benchers. Such cases are therefore like those already examined. So, too, the present case is clearly distinguishable from Winsor v. Mills.[87]

20—*Beneficiaries not Entitled to Partition.*

The provision in the present trust, that the shareholders are

[84] 2 De Gex, F. & J. 75, In re Dutton, 4 Exch. Div. 54.

[85] (1891) 3 Ch. 159.

[86] Gray, Perp. 409, note 2 Mars. Perp. 300.

[87] 157 Mass. 362, 32 N. E. 352.

not to have any interest or title in the trust property itself, and no right to call for partition, and that the shares shall be personal property, is not a restraint upon alienation, since the alienation of the legal and the equitable ownerships is provided for. It does not appear, and cannot be assumed, that the persons who organized the association and became its shareholders had title to the land held by the trustees. Their whole interest comes through the shares which are vendible without restraint. In Winsor v. Mills, supra, Philbrick, who held the title, owned two undivided thirds of the land and held the remaining undivided third in trust for Mills, under an explicit agreement that no sale or conveyance of the land, or of any part thereof, or of any interest therein, should be made by Philbrick, his heirs or assigns, except upon the written consent of Mills, his heirs or assigns; and there was also a provision by which a part of the land might be purchased by Mills, or his heirs or assigns, at a special price, at any time before the land should be otherwise sold or disposed of. These were restraints upon alienation, and were held void, because they might continue too long. The purpose of the trust was to prevent the alienation of the land, and to keep it out of commerce. Neither of the owners could convey his own share in the property, and the land was intentionally tied up.

The court is of opinion that the ruling at the hearing was correct; that the trusts set forth were not void as creating a perpetuity or imposing an illegal restraint upon alienation; and that the plaintiffs are not entitled to a winding up of the trust and a sale of the property, as prayed. They are entitled, upon the findings of the report, to an account, and also to receive regular accounts in the future, and a decree accordingly should be entered.

CHAPTER II.

VALIDITY.

RIGHTS DISTINGUISHED FROM LAW.

21—In General.

The only limitation placed on the trust in its development is that its purpose shall be not illegal or against the public policy of the state. In contemplating the trust as a business organization one of the first questions to present itself is, under what law is it organized and from what source does it receive its privileges and powers. The corporation, being a creature of the law, we may turn to the act under which it is organized and there find all the privileges set forth which it may exercise and enjoy. With the trust we are confronted with an entirely different situation, for it is not organized under any particular law, but comes into being from a right—a right which a free people may exercise in contracting, and alienating property. The trust as used in modern business has been confused with the common law, it in no way depends for its existence on the common law, only in so far as the common law protects common law rights.

As a medium for business, the trust has been used a great deal in England and Germany and is being developed and employed more and more each day in the different states here. With this expansion of the trust the question of its legality is raised constantly and will have to be answered to the satisfaction of business and manufacturing enterprise before it can

come into universal use. From earliest times the English courts have recognized the rights of individuals to form joint stock companies and make contracts independent of statute and the common law; the people exercised this right and the common law protected them in that right.[88] The courts in this country refer often to common law rights—a phrase which distinguishes from the common law. In reference to an insurance case in Ohio,[89] the court uses this language: "There was no class of business, the transaction of which, as a matter of private right, was better recognized at common law than that of making contracts of insurance upon the lives of individuals." Different courts in our country have said repeatedly that any right, interest or thing which may be the subject of property may be conveyed in trust; in fact every kind of a vested right which the law recognizes as valuable may be transferred in trust.[90] The only limitation which has been placed on the trust, as stated above, is that its purpose shall be not illegal or against the public policy of the state.

In some form or other, the trust has been before the courts in practically every state in the union, and in most cases the particular questions have been passed on without the origin of the trust being considered or its existence as a matter of right being debated.[91] Following our colonial days, we not only rec-

[88] In re Mexican and S. A. Co., 27 Beav. 474; 6 L. R. A. (N. S.) 665.

[89] State v. Ackerman, 51 Ohio St. 163, 37 N. E. 828, 24 L. R. A. 298.

[90] Burke v. Burke, 259 Ill. 262, 102 N. E. 293; Venner v. Chicago City Ryl Co., 258 Ill. 523, 101 N. E. 949; Thomas v. Lamb, 11 Cal. App. 717, 106 Pac. 254; Sears Trust Estates, 2nd Edition 370; Thompson-Business Trusts 16.

[91] Hart v. Seymour (1893), 147 Ill. 598, 35 N. E. 246, 7 A. L. R. 613; Mallory v. Russell (1887), 71 Iowa 63, 6 Am. Rep. 776, 32 N. W. 102; Hoadley v. Essex County (1870), 105 Mass.

ognized and followed the English rule as to rights and privileges, but also specifically set forth in the Declaration of Independence "that all men are created equal; that they are endowed by their Creator with certain unalienable rights; that among these are life, liberty, and the pursuit of happiness; that to secure these rights governments are instituted among men." Here we have an expression of rights which governments are organized to uphold; the law being simply the means of maintaining and protecting these rights.

Section 1 of article 2 of the Constitution of Illinois says: "That all men are by nature free and independent, and have certain inherent and inalienable rights. Among these are life, liberty, and the pursuit of happiness." Section 2 of article 2 of the Constitution is as follows: "No person shall be deprived of life, liberty, or property without due process of law." The Supreme Court of Illinois, in the case of Bessette v. People,[92] said that the constitutional guaranties secured by these provisions include the right of the citizen to follow his individual preference in the choice of an occupation.[93] The general proposition that the enjoyment by the citizen of the privilege of pursuing an ordinary calling or trade upon terms of equality with all others in similar circumstances is a general part of his rights of liberty and property which has been assented to by

519; Frost v. Thompson (1914), 219 Mass. 360, 106 N. E. 1009; Cross v. Jackson (1843), 5 Hill. 478; King v. Townshend (1894), 141 N. Y. 358, 36 N. E. 513; Merchants Nat. Bank v. Wehrmann (1903), 69 Ohio St. 160, 68 N. E. 1004; In Re Pittsburg Wagon Works' Estate (1903), 204 Pa. 432, 54 Atl. 316; Connelly v. Lyons (1891), 82 Tex. 664, 21 Am. St. Rep. 935, 18 S. W. 799.

[92] 193 Ill. 334, 62 N. E. 215.

[93] Black, Const. Law, pp. 404, 411; Ruhstrat v. People, 185 Ill. 133; 49 L. R. A. 181, 57 N. E. 41.

the Supreme Court of the United States.[94] The court, in Bessette v. People, supra, further stated that the right to follow any of the common occupations of life is an inalienable right. It was formulated as such under the phrase 'pursuit of happiness' in the Declaration of Independence which commenced with the fundamental proposition that 'all men are created equal; that they are endowed by their Creator with certain inalienable rights; and among these are life, liberty, and the pursuit of happiness.' This right is a large ingredient in the civil liberty of the citizen. It was also said in the case of Allgeyer v. Louisiana, supra, that the liberty of pursuit—the right to follow any of the ordinary callings of life—is one of the privileges of a citizen of the United States. In Braceville Coal Co. v. People,[95] the court said that liberty, as that term is used in the Constitution, means not only freedom of the citizen from servitude and restraint, but is deemed to embrace the right of every man to be free in the use of his powers and faculties, and to adopt and pursue such avocation or calling as he may choose, subject only to the restraints necessary to secure the common welfare. In discussiong this question of rights further, the Supreme Court of Illinois, in another case,[96] says that the terms 'life,' 'liberty,' and 'property' are representative terms, and intended to cover every right to which a member of the body politic is entitled under the law. These terms include the right of self-defense, freedom of speech, religious and political freedom, exemption from arbitrary arrests, the right freely to buy and sell as others may. Indeed, they may embrace all

[94] Powell v. Pennsylvania, 127 U. S. 678, 32 L. ed. 253, 8 Sup. Ct. Rep. 992; Allgeyer v. Louisiana, 165 U. S. 578, 41 L. ed. 832, 17 Sup. Ct. Rep. 427.

[95] 147 Ill. 66, 22 L. R. A. 340, 35 N. E. 62.

[96] Gillespie v. People, 188 Ill. 176, 80 Am. St. 176, 52 L. R. A. 283.

our liberties, personal, civil, and political, including the rights to labor, to contract, to terminate contracts, and to acquire property. None of these liberties and rights can be taken away, except by due process of law.[97] The rights of life, liberty, and property embrace whatever is necessary to secure and effectuate the enjoyment of those rights. The rights of liberty and of property include the right to acquire property by labor and by contract.[98] In this last sentence the court expressly states that an inalienable right is the right to contract, and in its first and last analysis the trust is nothing more or less than a contract. It is the alienation of property with or without consideration; it is created by the mutual acts of the parties.

In a case before the Federal court,[99] the question as to the right of a trust to carry on a manufacturing business was not involved, but the court clearly decided that the trust derived none of its right, qualities or benefits from any statute. From this it might be argued that the trust is a creature of the common law. In a Massachusetts case,[100] the question of the rights and privileges of the trust was put in issue in relation to taxation on what was termed an association; the court said that the association was not a corporation; that it was merely a partnership with all the incidents and responsibilities of a partnership; that it enjoyed no franchise confirmed upon it by legislature: that it did not ask for or enjoy any corporate or special privilege; that it had constituted its partnership under its common law rights and such legal agreements as it chose to make. Here the court expressly recognized the common law right to contract

97 2 Story, Const. 5th ed. Sec. 1950.

98 Ritchie v. People, 155 Ill. 98, 29 L. R. A. 79, 40 N. E. 454.

99 Malley v. Bowditch, 259 Fed. 809, 170 C. C. A. 609, 7 A. L. R. 608.

100 Gleason v. McKay, 134 Mass. 419.

as distinguished from the common law. In a New York case,[1] where the question of right was involved, it was said that the relation which parties assume in creating associations is wholly the product of their mutual agreements and depends in no respect upon the grant or authority of the state; it is founded on the rights of citizens individually to join their capital and enterprise by contract. This doctrine is in keeping with an Indiana case,[2] which expresses the view that the trust is a citizen and entitled to all the rights and privileges of an individual. In the case of Spotswood v. Morris,[3] which involves a trust organized in Idaho for the purpose of dealing in land, the court not only adopts the view expressed in the Winchester v. Coleman case just cited, but also emphasizes the common law right to contract. Trusts for business purposes are quite commonly referred to as common law companies, and they are generally referred to as organized under the common law. From the foregoing decisions it would seem that the phrase "common law company" as referring to a trust is a misnomer, for they are created in this country, as in England, under the right of citizens to contract. A case before the Appellate court of Illinois,[4] in which a trust was involved in litigation over the sale of some of its securities, is of interest for the reason that the attorneys on both sides as well as the court, followed the theory that the trust was a creature of the common law. The facts in the case as taken from the decision are in substance as follows:

[1] Winchester v. Coleman, 133 N. Y. 279, 16 L. R. A. 183, 31 N. E. 96.

[2] Farmers Loan & Trust Co. v. Chicago & A. Ry. Co., 27 Fed. 146.

[3] 12 Idaho 360, 85 Pac. 1094, 6 L. R. A. (N. S.) 665.

[4] Kinross v. Cooper, App. Ct. Ill., Feb. 1922.

22—Sale of Beneficial Interests—In Reference to Security Act.

John W. Kinross, John J. Cooper, Sam W. Cassaway and William J. Peck, who claimed to be trustees of the American Manufacturing Company, of Peoria, which was alleged to be a joint stock or common law company, took judgment by confession in the Circuit Court of Peoria County against one W. D. Cooper, for $1142.35, upon two promissory notes for $500.00 each; Cooper asked to have the judgment vacated with leave to plead, which was allowed. He then filed the general issue and six special pleas, all of which were subsequently withdrawn except the sixth and seventh special pleas. A general and special demurrer was filed by the trust through its trustees to the special pleas; on a hearing the demurrer was overruled. The trustees elected to stand by the demurrer, whereupon judgment was entered in favor of W. D. Cooper, and from that judgment the trustees' appeal was prosecuted.

The sixth and seventh special pleas filed by W. D. Cooper (appellee) set up in substance that the American Manufacturing Company and appellee entered into an agreement whereby appellee was to purchase ten shares of the capital stock of the American Manufacturing Company at the par value of $100.00 each, and the notes were made, executed and delivered in consideration therefor; that the American Manufacturing Company was not a corporation, either domestic or foreign, but was an unincorporated association holding itself out as an organization under the common law in force in the State of Illinois; that it had not qualified its stock, and participation certificates for sale in Illinois pursuant to the terms and provisions of the Illinois securities law of 1919, and by reason thereof the sale in question was void and the consideration for which the notes were executed wholly failed. Cooper further sets out

as his defense to the notes that the Trust was a common law company and that it failed to comply with the Security Act. The trust, by its demurrer, admits that it is a common law company; this, in effect, eliminates from the controversy the trust question, and leaves the court to determine whether a common law company, in the sale of its securities, is subject to the Security Act. Had the trust denied that it was a common law company and set forth that it was organized by the trustor under his right to contract, an entirely different question would have been presented to the court than the one to determine the right of a common law company to sell its shares without complying with the Security Act. The court, in passing on the question, said: "The sole question upon this appeal is whether or not the Illinois Securities Law includes within its scope a declaration of trust or common law company."

23—*Illinois Security Act in Reference to Common Law Companies.*

The Illinois Securities Act, Hurd's Statutes of 1919, page 2672, is entitled "An Act relating to the sale or other disposition of securities and providing penalties for the violation thereof." Section 2 defines securities under the act to include stocks, bonds, debentures, notes, participating certificates, certificates of shares or interest, pre-organization certificates, subscription certificates evidencing shares in trust estates or associations, and profit sharing certificates. In the same section the word 'issuer' as used in the Act is defined to include every person and every company, trust, partnership or association incorporated or unincorporated heretofore or hereafter formed for any lawful purpose and organized under the laws of this state or any other foreign state or country which shall issue

any security sold or offered for sale to any person or persons in this state. Section 3 divides securities into four classes: A, B, C, and D. It seems to be conceded that the stock issued in this case comes under Class D. It is admitted that prior to the sale set out in the pleas, the provisions of sections 9 and 10 were not complied with relative to statements and documents to be filed with the Secretary of State. Section 37 provides that every sale of stock in violation of the provisions of the act and where the act is not complied with shall be void.

The court in commenting on the theory advanced by the trust said: "The contention of appellants is that a joint stock company or common law company does not come within the provisions of Section 2; that the term 'laws of this state,' as used in Section 2, does not include the common law; that in order to bring the issuer of stock within the act, two things are required, first: that the issuer must be formed for a lawful purpose, and second: that it must be organized under the laws of this state or a foreign state or country, and if it is not so organized such issuer does not come within the terms of the act. It is also urged that a common law company is not organized under the laws of this state or any foreign state or country but is based upon a written instrument or contract between the shareholders and the trustees, and the contract creates a trust estate; that the contract or deed of trust in this case was recorded in the recorder's office of Peoria County, and, therefore, became a public document whereby the public is charged with notice of its contents."

The trustees argued that they were not organized under the laws of Illinois or any foreign state or country, but that their trust was based upon a written contract between the shareholders and the trustees; the trouble with that argument is that in their pleadings they admit they are organized under the

common law. The court in discussing this point says: 'In support of this position appellant cites the case of Elliott v. Freeman[5] which involved a federal corporation tax act which by its terms was to include 'all corporations now or hereafter organized under the laws of the United States or of any state or territory in the United States, or under the act of Congress applicable to Alaska or the District of Columbia.' It was there held by the Supreme Court of the United States that the word 'laws' means statutes, and that a common law company was not within the terms of the act. It is insisted that the word 'laws' in the Illinois Act is used with the limitation placed upon it by the Supreme Court of the United States, and that to give it any other meaning would be a violation of Section 10, Article 1, of the Federal Constitution, and Article 2, Section 14 of the Constitution of Illinois, which prohibit laws impairing the obligation of contract. There is no question in this case as to the constitutionality of the Illinois securities law. That question was not raised in the trial court and is not raised in this court. Since the briefs and arguments have been filed in this case the Supreme Court, in the case of Stewart v. Brady,[6] has held that this law is constitutional. The only question on this appeal, therefore, is whether the Illinois Securities Act includes common law companies.

24—Common Law as Effected by Statute.

The common law until repealed by legislative enactment is in full force and effect in this state. (Hurd's Statute 1919, Chapter 28, Section 1, Page 680.) The laws of this state include the constitution, statutes and rules applied in the admin-

[5] 220 U. S. 178, 55 L. ed. 424, 31 Sup. Ct. Rep. 360.

[6] Stewart v. Brady, 300 Ill. 425, 133 N. E. 310.

istration of justice as construed and applied by the courts of last resort in this state. To this may be added the common law. In Hunt v. Chicago & Dummy Ry. Co.[7] the question raised was the construction of the Illinois constitution as to the duties of the attorney general. The constitution authorizes the attorney general to perform such duties as may be prescribed by law and defendants urged that the words 'prescribed by law' meant that the attorney general shall perform such duties as shall be prescribed by any law, statutory or otherwise, and on Page 289 the court says: 'The common law of England, having been expressly adopted in this state, is as much a part of our law—wherever it is applicable and so far as it has not been changed by statute—as are the statutes themselves; and a duty required of the attorney general by the rules of the common law is as much a duty required of him by law as though it were imposed by the expressed mandate of the statute.' If the common law is a part of the law of this state, then a corporation organized under the common law would come within the provisions of Section 2, notwithstanding the decision in the Elliott case to the contrary. This is a question of construction under the laws of the state of Illinois, and it is not a question of construction under the laws of the United States. Section 2 includes every person, company, trust, partnership or association incorporated or unincorporated heretofore or hereafter formed and organized under the laws of this state. The legislature intended under this section to include all organizations either at common law or under a statute.

Cooper contended that the American Manufacturing Company exercised practically all of the functions of a corporation but that under the laws of this state it was in fact a partnership

[7] Hunt v. Chicago & Dummy Ry. Co., 20 Ill. App. 282.

and not a common law company. In support of this contention, the case of Pilsen Brewing Co. v. Wallace,[8] was cited where it was held that a company which is not a corporate body is a partnership composed of the officers and subscribers to the articles of the association. Many other cases were cited in support of this position. The court, in a summary of its decision, said: "If the American Manufacturing Company were a partnership, it would be required to comply with the provisions of the law the same as an individual or a corporation. It made no difference, so far as the decision of this question was concerned, whether the appellant company was a common law company or was a partnership, for the reason that in either case it came within the provisions of the statute. There was no attempt to comply with the law. The sale of the shares was void and for that reason the demurrer was declared properly overruled to the sixth and seventh pleas."

There is no question but that the common law is a part of the law of Illinois; but this trust was not organized under the common law, for there is no part of the common law applicable to trusts, except in that the common law upholds a common law right. It was erroneously assumed by both sides of the case in their pleadings that the American Manufacturing Company was a common law company. The argument of the trustees was that they existed as a matter of right, if their pleadings had been such that the court could have passed on that question, undoubtedly it would have followed the cases previously cited wherein a right was distinguished from the law. Trusts are organized as a matter of right, and the law is simply a means of protecting the interests under that right, or

[8] Pilsen Brewing Co. v. Wallace, 291 Ill. 59, 125 N. E. 714, 8 A. L. R. 579.

as said by Justice Field, in the slaughter-house cases,[9] "Rights are the gift of the creator which the law does not confer, but only recognizes."[10]

THE TRUST AS AN ENTITY.

25—*In General.*

In different jurisdictions and different courts, trusts have been called 'associations,' 'unincorporated companies,' and 'partnerships.' In all probability this confusion is caused mainly by loosely drawn instruments wherein the liability of the trustees and beneficiaries is not clearly defined or properly limited, or by failure of the court to recognize the trust as an entity. In a Texas case[11] where the trustees were not under the supervision of the beneficiaries, but were in exclusive control of the property, the court in passing on the trust as an entity said: "The first question arising on the appeal is whether the agreement entered into between the parties to the suit, and under the terms on which they organized and were conducting the business in which they were engaged, created a partnership or an unincorporated joint-stock company, or a trust as distinguished from a partnership or such company. We have examined the trust agreement in question and the authorities at our command bearing upon the subject as carefully as we have been able to do, and conclude that said agreement created a 'trust' and not a company, association, or partnership." This

[9] 83 U. S. 16 Wall. 97, 21 L. ed. 415.

[10] See State v. Scougal, 3 S. D. 55, 51 N. W. 858, 15 L. R. A. 477; 44 Am. St. Rep. 756. This case is reported in full under chapter "Business and Legislation."

[11] Davis v. Hudgins, 225 S. W. 73. This case is reported in full herein under the paragraph on Receiver in Bankruptcy.

decision is emphasized by the United States Supreme Court in Crocker v. Malley,[12] in differentiating between a trust and an association. The court makes it clear that a pure trust, active and functioning as such, has a standing in law as a trust. In this case the trust was organized for the purpose of collecting rents and income. Taxes were assessed against it as a joint stock association, which were paid; the trust then filed suit to recover taxes paid under protest to the collector of internal revenue. The taxes were assessed to the plaintiffs as a joint-stock association within the meaning of the Income Tax Act of October 3, 1913, c. 16, Section II, G (a), 38 Stat. 114, 166, 172, and were levied in respect to dividends received from a corporation that itself was taxable upon its net income. The plaintiffs maintained they were not an association but simply trustees, and subject only to the duties imposed upon fiduciaries by Section II, D. The Circuit Court of Appeals decided that the plaintiffs together, it would seem, with those for whose benefit they held the property, were an association and ordered judgment for the defendant, reversing the judgment of the District Court.[13] The facts taken from the reports in substance are as follows:

26—A Trust to Distribute Income.

A Maine paper manufacturing corporation with eight shareholders, had its mills on the Nashua River in Massachusetts and owned outlying land to protect the river from pollution. In 1912 a corporation was formed in Massachusetts. The Maine corporation conveyed to it seven mills and let to it an eighth that was in process of construction, together with the

[12] 249 U. S. 223, 63 L. ed. 573, 270.
2 A. L. R. 1601, 39 Sup. Ct. Rep.
[13] 250 Fed. 817.

outlying lands and tenements, on a long lease, receiving the stock of the Massachusetts corporation in return. The Maine corporation then transferred to the plaintiffs as trustees, the fee of the property subject to lease, leaving the Massachusetts stock in their hands, and was then dissolved. By the terms of the declaration of trust the plaintiffs declared that they held the real estate and all other property at any time received by them thereunder, subject to the provisions thereof, "for the benefit of the cestui que trusts (who shall be trust beneficiaries only, without partnership, associate or other relation whatever inter sese)" upon trust to convert the same into money, and distribute the net proceeds to the persons then holding the trustees' receipt certificates—the time of distribution being left to the discretion of the trustees, but not to be postponed beyond the end of twenty years after the death of specified persons then living. In the meantime, the trustees were to have the powers of owners. They were to distribute what they determined to be fairly distributable net income according to the interests of the cestui que trusts, but could apply any funds in their hands for the repair or development of the property held by them, or the acquisition of other property, pending conversion and distribution. The trust was organized and put in force because of the determination of the Maine corporation to dissolve without waiting for the final cash sale of its real estate and was declared to be for the benefit of the eight shareholders of the Maine Company who were to receive certificates subject to transfer and subdivision. Then followed a more detailed statement of the power of the trustees and provision for their compensation, not exceeding one per cent of the gross income unless with the written consent of a majority in interest of the cestui que trusts. A similar consent was required for the filling of a vacancy among the trustees, and for a modifica-

tion of the terms of the trust. In no other matter had the beneficiaries any control. The title of the trust was fixed for convenience as The Massachusetts Realty Trust. Taxes were assessed against this trust on the theory that it was an association; the court upon examining the instrument creating the trust said:

"The declaration of trust on its face is an ordinary real estate trust of the kind familiar in Massachusetts unless in the particular that the trustees' receipt provides that the holder has no interest in any specific property and that it purports only to declare the holder entitled to a certain fraction of the net proceeds of the property when converted into cash 'and meantime to income.' The only property expressly mentioned is the real estate not transferred to the Massachusetts corporation. Although the trustees in fact have held the stock of that corporation and have collected dividends upon it, their doing so is not contemplated in terms by the instrument. It does not appear very clear that the eight Maine shareholders might not have demanded it, had they been so minded. The function of the trustees is not to manage the mills, but simply to collect the rents and income of such property as may be in their hands, with a large discretion in the application of it, but with a recognition that the receipt holders are entitled to it, subject to the exercise of the powers confided to the trustees. In fact, the whole income, less taxes and similar expenses, has been paid over in due proportion to the holders of the receipts."

27—Functions of Trustees and Beneficiaries—Distinguished.

The question as to the rights and powers of the certificate holders was involved in this case; their rights and the extent of their actions govern in determining whether the instrument

created a trust, partnership or association. The court taking up this provision in the instrument said: "There can be little doubt that in Massachusetts this arrangement would be held to create a trust and nothing more. The certificate holders are in no way associated together, nor is there any provision in the instrument for any meeting to be held by them. The only act under the declaration of trust which they can do is consent to an alteration of the trust and to the other matters that we have mentioned. They are confined to giving or withholding assent, and the giving or withholding it is not to be had in a meeting but is to be given by them individually. The sole right of the cestuis que trust is to have the property administered in their interest by the trustees who are the masters, to receive income while the trust lasts, and their share of the corpus when the trust comes to an end."[14]

The trust was assessed as an association under Section II, G (a) but the contention of the trustees was that they were not an association, but a pure trust, and as fiduciaries they were called upon only to make a return of the net income of the person for whom they acted—as provided in Section II, D. The court, in deciding this, said: "The question is whether a different view is required by the terms of the present act. As by D referred to, trustees and associations acting in a fiduciary capacity have the exemption that individual stockholders have from taxation upon dividends of a corporation that itself pays an income tax, and as the plaintiffs undeniably are trustees, if they are to be subjected to a double liability the language of the statute must make the intention clear."[15]

In commenting further on this question, the court said:

[14] Williams v. Milton, 215 Mass. 1, 102 N. E. 355.

[15] Gould v. Gould, 245 U. S. 151-3, 38 Sup. Ct. 53, 62 L. ed. 211; United States v. Isham, 17 Wall. 496, 504, 21 L. ed. 728.

"The requirement of G (a) is that the normal tax thereinbefore imposed upon individuals shall be paid upon the entire net income accruing from all sources during the preceding year 'to every corporation, joint-stock company or association, and every insurance company organized in the United States, no matter how created or organized, not including partnerships.' The trust that has been described would not fall under any familiar conception of a joint-stock association, whether formed under a statute or not.[16] If we assume that the words 'no matter how created or organized' apply to 'association,' and not only to 'insurance company,' still it would be a wide departure from normal usage to call the beneficiaries here a joint-stock association when they are admitted not to be partners in any sense, and when they have no joint action or interest and no control over the fund. On the other hand, the trustees, by themselves, cannot be a joint-stock association within the meaning of the act, unless all trustees with discretionary powers are such, and the special provision for trustees in D is to be made meaningless. We perceive no ground for grouping the two—beneficiaries and trustees—together in order to turn them into an association, by uniting their contrasted functions and powers, although they are in no proper sense associated. It seems to be an unnatural perversion of a well-known institution of the law.

We do not see either that the result is affected by any technical analysis of the individual receipt holder's rights in the income received by the trustees. The description most in accord with what has been the practice would be that, as the receipts declare, the holders until distribution of the capital were

[16] Smith v. Anderson, 15 Ch. D. 247, 273-4-7, 282; Elliott v. Freeman, 220 U. S. 178, 186, 31 Sup. Ct. 360, 55 L. ed. 424.

entitled to the income of the fund, subject to an unexercised power in the trustees in their reasonable discretion to divert it to the improvement of the capital. But even if it were said that the receipt holders were not entitled to the income as such until they got it, we do not discern how that would turn them into a joint stock company. Moreover the receipt holders did not get it and the question is what portion it was the duty of the trustees to withhold. We presume that the taxation of corporations and joint-stock companies upon dividends of corporations that themselves pay the income tax was for the purpose of discouraging combinations of the kind now in disfavor, by which a corporation holds controlling interests in other corporations which in their turn may control others, and so on, and in this way concentrates a power that is disapproved. There is nothing of that sort here. Upon the whole case, we are of opinion that the statute fails to show a clear intent to subject the dividends on the Massachusetts corporation's stock to the extra tax imposed by G (a).

The plaintiffs as they themselves alleged in their claim, were the persons taxed, whether they were called an association or trustees. They were taxed too much. If the United States retains from the amount received by it the amount that it should have received, it cannot recover that sum in a subsequent suit. Judgment of the Circuit Court of Appeals reversed. Judgment of the District Court affirmed."

In this case we have the language of the United States Supreme Court giving validity to the trust as a business organization: "we perceive no ground for grouping the two—beneficiaries and trustees—together in order to turn them into an association, by uniting their contrasted functions and powers, although they are in no proper sense associated." This rule laid down from our court of last resort, recognizing the trust

as an entity, establishes the law we are to follow. Trust agreements which properly set forth the powers and duties of the trustees, with limitation on the beneficiaries, come within this rule;[17] trusts of this character will have no trouble on that score in other jurisdictions.

PUBLIC POLICY.

28—*In General.*

It would seem to be almost unnecessary to discuss the trust in its relation to the public policy of the state, in view of its validity and the recognition of its rights, established by the judiciary of the country. However, there are three decisions spoken of freely, and in some instances they have been used as an argument as to why the trust, as such, is against the public policy of the state; two of these are in Ohio and in neither of these was the trust question involved. The third is an Illinois case, and in that one there is no reference to the trust being against public policy.

One of the Ohio cases is known as the State v. Manufacturers Mutual Fire Association;[18] in this case proceedings were instituted to oust the Mutual Fire Association from exercising the franchise of a corporation under the laws of Ohio. The petition stated that the Manufacturers Mutual Fire Association

[17] Connally v. Lyons, 82 Texas 664, 18 S. W. 799, 21 Am. St. Rep. 935; Williams v. Milton, 215 Mass. 1, 102 N. E. 355; Rhode Island Hospital Trust v. Copeland, 39 R. I. 193, 98 Atl. 273; Mayo v. Moritz, 151 Mass. 481, 24 N. E. 1083; Smith v. Anderson, 15 Ch. D. 247; State v. Lee, 233 S. W. 20. See *Trust* Not partnership, under Trusts Distinguished From Other Organizations.

[18] 50 Ohio St. 145, 33 N. E. 401, 24 L. R. A. 252.

was a corporation duly incorporated under the laws of the State of Ohio. The association was organized under a special act providing for the Manufacturers Mutual Insurance Association; it was found that it violated the act in question; that it had been exercising powers and franchises not authorized by the statute; and for these reasons the prayer in the petition of ouster was granted. There was no question of a trust involved, so the decision, while it has been used in reference to trusts, has no application whatever.

The other Ohio case is State v. Ackerman;[19] it is said that the Attorney General of Ohio cites this case in support of his contention that proceedings in quo warranto may be brought against any association of persons who act in the state without being legally incorporated.[20] The facts in that case show that an organization was put together for the purpose of writing insurance in the state of Ohio; a copy of the agreement will be found in the appendix herein, and is interesting reading from the viewpoint of an association. The petition was filed against C. F. Ackerman and ninety-nine other persons who were transacting the business of guarantee and accident insurance in the state of Ohio under the name of the Guarantee and Accident Lloyds, New York, to oust them from carrying on that business, because they had not complied with the laws of the state or received any authority from it to do business of that kind. Ohio has a statute which provides that quo warranto may be maintained first, against a person who unlawfully exercises a franchise; second, against an association of persons who act as a corporation within the state without being legally incorporated; the action in this case was to prosecute on both grounds.

[19] 51 Ohio St. 163, 37 N. E. 828, 24 L. R. A. 298.

[20] Sears, 2nd Ed. 344.

It was claimed that the laws of Ohio did not apply to the defendants because they were not a corporation, company, or association, or acting as such; but that in making contracts of insurance each individual acted for himself. However, the court did not adopt that view, but said that an examination of their articles of agreement showed that they had associated themselves together in a business under a common name, and that the capital was under the control of a board of managers; that the language of the petition showed sufficiently that the defendants in transacting the business of insurance in the state were exercising unlawfully a franchise within the state, and were acting as a corporation therein without being legally incorporated. In reaching its decision, the court cites the Illinois case, Green v. People.[21] This latter case does not touch on the question of trust; that issue was not raised, so the decision throws no light on the subject of the trust as operating against public policy. If, however, the defendants had been a pure trust engaged in the insurance business, we might have had some law applicable to the trust problem. This case will be discussed in connection with the report of the Attorney General of Illinois, which report, on page 422, Quarterly No. 4, 1919, reads as follows: "The transfer of property to a 'manager' and a 'subscribers' committee' of five persons, giving them general and complete supervision and management in the purchase and improvement of real estate with the right of mortgage, exchange or sale, etc., the title to all of the property to be in the 'manager,' or in such person or corporation as he may designate, absolving the 'manager' and the 'subscribers' committee' from liability for error of judgment, and limiting the liability to all participants to the amount subscribed, evidenced

[21] 150 Ill. 513, 37 N. E. 842.

by subscription certificates, may or may not constitute the certificate holders partners, but the arrangement or agreement is against public policy in that it attempts to permit the exercise of corporate powers without corporate safeguards."

On Page 425 of the same report, the Attorney-General, in writing to the Secretary of State in reference to a syndicate agreement, says: "As to such an organization being against the policy of this State by reason of the fact that the agreement seeks to limit the liability of the certificate holders and makes said certificates negotiable as set forth in Sections 7 and 14 of said agreement, I desire to call your attention to the case of Green, et al., v. People, ex rel., in which the court held that: 'An association or number of persons in the business of insurance, by professedly limiting their liability to the amount of money contributed by each, and assuming to give perpetuity to the business by making membership certificates transferrable by the assignment of the member or his personal representative, will thereby act as a corporation, and will be liable to judgment of ouster. And the fact that such persons may be held individually liable upon policies of insurance which they may have issued, will not relieve them of the charge of having acted as a corporation.' "

The case of Green v. People, supra, is the third case cited occasionally as upholding the theory that it is against the public policy of the State of Illinois for a business to be conducted under a trust agreement. On examining this case we find that some parties organized, and then engaged in the insurance business; in their organization they limited their liability to the amount of money contributed by each, and assumed to give perpetuity to the business. Had this organization been before the court as a pure trust, it would have been bad in these two features. First, the liability should have been limited to the

assets of the organization, and not to what was paid in by the organizers. Second, by trying to give perpetuity to the organization, they violated one of the fundamental elements of the trust—the Rule against Perpetuities. Either one of these reasons would have been sufficient to bar these parties from Illinois or any other state as a trust, irrespective of what business it might be engaged in; but this argues nothing for or against the trust, for the trust, as such, was in no way involved in the case or in the findings of the court. A trust correctly formed cannot properly be designated a corporation, partnership, association, or anything but a trust.[22] In this decision there is not a word, either expressed or implied that it is illegal, improper, or against the public policy of the State of Illinois for a business to be carried on under a trust agreement. Referring again to the Attorney-General's Report of Illinois for 1919, we find this language on page 350: "Even if the agreement were interpreted to create a valid trust, I think that the trustees in selling and in advertising for sale these securities by which the trust fund is to be increased, must be held to comprise an association." The Supreme Court of Texas answers this squarely[23] by saying that the trust is a trust pure and simple, and is not to be called something it is not; further the United States Supreme Court says:[24] "We perceive no ground for grouping the two beneficiaries and trustees—together in order to turn them into an association."

Again on page 427 the report reads as follows: "While there may be some difference in the articles of association in the case above referred to and that of the Reilly Syndicate, it appears from said opinion that the policy of this state is against

[22] See Paragraph—Trust as an Entity.

[23] Davis v. Hudgins, Supra.

[24] Crocker v. Malley, Supra.

such organizations." In other words, the office of the Attorney-General of Illinois takes the position that it is against the public policy of the State of Illinois for a business to be carried on as a trust.

29—A Trust for Operating Street Car Lines.

Opposed to this opinion is the Supreme Court of Illinois in the case of Venner v. Chicago City Railways Company,[25] in which case other questions such as a committee in conjunction with trustees; common ownership of stock; transferring stock to qualify directors; stockholders pooling their interests for common gain or controlling the management, competition and consolidation are also passed on. The case grew out of a trust which was organized for the purpose of taking over five corporations that were operating street car lines, some of them in Chicago, Cook County, Illinois, and some of them in Indiana. The corporations which composed the trust and the number of shares of capital stock of each, and their par value, were as follows:

	No. of Shares	Par Value
Chicago City Railway Company....	180,000	$18,000,000
Calumet and South Chicago Ry. Co..	50,000	5,000,000
Southern Street Railway Company..	8,000	800,000
Hammond, Whiting & E. Chicago Ry. Co.	10,000	1,000,000
Chicago and Western Ry. Co.....	720	72,000

On January 1st, 1919, Ira M. Cobe and John W. McKinnon held all of this stock, except 10,281 shares of the Chicago City Railway Company, together with $7,674,000 of the bonds of the corporations except the Chicago City Railways Company. By a written agreement they assigned all these shares of stocks

[25] 258 Ill. 523, 101 N. E. 949.

and bonds to Elbert H. Gary, Albert J. Earling and Samuel M. Felton, as Trustees. The trust made provision for the holding and voting by the trustees of the stock of the different corporations, and for the creation of a committee. Clarence H. Venner, one of the stockholders in the Chicago City Railway Company, filed a bill in the Superior Court of Cook County, in behalf of himself and all other stockholders similarly situated, for the purpose of having the trust declared illegal and void; of enjoining the transfer, holding or voting by the trustees of said trust of any shares of stock in the Chicago City Railway Company or the performance of any other act in pursuance of the said agreement; of enjoining the combining, merging, consolidating or uniting of the property, franchises, earnings, capital stock or management of the Chicago City Railway Company with those of other defendant corporations, or any of them, or with those of the elevated railroads in the city of Chicago. Answers were filed, and cause was heard on the pleadings and evidence, a decree was rendered dismissing the bill for want of equity, and the complainant appealed.

The defendants to the bill were the Chicago City Railway Company and its directors, four other street railway companies, viz., the Calumet and South Chicago Railway Company, the Hammond, Whiting and East Chicago Electric Railway Company, the Southern Street Railway Company and the Chicago and Western Railway Company, Ira M. Cobe, John W. McKinnon, the firm of J. P. Morgan & Company, the trustees and members of the committee named in the trust agreement, and others. The Hammond, Whiting and East Chicago Electric Railway Company was an Indiana corporation, having certain lines of street railway in the state of Indiana which it operated and connected at the State line with the lines of the Calumet and South Chicago Railway Company. The lines of all these

street railway companies, except the Indiana company, connected at various points with the lines of the Chicago City Railway Company, and none of them had access to the business center of the City of Chicago except over the lines of the latter company. This was the situation when, on February 11, 1907, the city adopted an ordinance authorizing the Chicago City Railway Company to construct, maintain and operate a system of street railways in the streets of Chicago.

30—*Powers Given to Trustees.*

The bill was filed on January 22, 1910, and the trust agreement which constitutes the cause of complaint bears date January 1, 1910. At the latter date all the ordinances and agreements which have been mentioned were in force and the Chicago City Railway Company was in possession of all the lines of railway of all the corporations named, and was operating them in compliance with the terms of the several ordinances and agreements. J. P. Morgan and Company had been in control of a majority of the stock of the Chicago City Railway Company since before the passage of the ordinance of February 11, 1907. The stock and bonds were to be held by the trustees and their successors, with all the rights and powers of stockholders or bondholders, with full power of sale or other disposition of all or any part thereof during the lives of eight persons named and during the life of the survivor and twenty years thereafter, unless the trust should be sooner terminated. The trustees were to issue $22,000,000 of five per cent bonds, payable only out of the principal and income of the trust fund, and to execute a collateral trust indenture with the First Trust and Savings Bank of Chicago, to which all the stock and bonds constituting the trust fund were to be assigned in trust to secure

the payment of the five per cent bonds which were then to be certified by the bank. Subject to the obligation of the five per cent bonds, the beneficial interest in the trust fund was to be in the holders of the preferred and common participation shares, of which 250,000 and 150,000 respectively, transferable but having no stated value, were to be issued. Provision was made for the division of the net income from the fund and the final division of the principal among the participation shareholders.

The trust agreement further provided that "subject to the provisions of the indenture securing the five per cent bonds, the trustees shall have the right to vote on any and all shares of stock constituting any part of the trust fund, at any and all meetings, regular or special, of the corporation or corporations issuing such stocks, and subject to the terms and provisions of this trust agreement, the trustees may take any action or may give or execute any consent or may take any step which the owners of such stock would be entitled or authorized to take, give or execute, with the same force and effect as though at the time the trustees were the absolute owners of such stock; and from time to time the trustees may give proxies to any person or persons to vote such stock, but in voting upon any of said stock the trustees shall follow the directions or instructions, if any, that may be given to the trustees by the committee, and shall cause their proxies also to follow such directions or instructions. The trustees and the committee assume no personal responsibility respecting the voting of said stock or in the management thereof or in respect of any action taken by them as such stockholders." The trustees were also authorized to transfer to any person any shares of stock in any company whose securities constituted a part of the trust fund, in order to qualify such person as a director or officer of such

company or for the purpose of maintaining the organization of the company; to permit to be sold or leased to, or merged or consolidated with each other, any corporations or companies any of whose shares, bonds or securities constituted any part of the trust fund, and "to vote upon any of the shares constituting any part of the deposited securities in favor of any lawful consolidation, merger or re-organization of the properties, franchises or shares of any of the companies whose shares or part thereof shall constitute part of said trust fund, with the properties, franchises and shares of any other company."

31—*Trustees Subject to Committee.*

In this trust the trustees held title to all property, but they were subject to a committee whose will the trustees must follow. One of the objections to the trust as a means for business organization is that the shareholders have no voice in the management of the business, and are not protected. A trust giving the shareholders the right to elect a committee to act as an advisory board with the trustees would obviate this difficulty. The committee would not control the trustees, but would be a means whereby the shareholders could secure concerted action in the event the trustees were not carrying out properly the spirit of the trust. However, the committee in this case was for an entirely different purpose; the court reads a portion of the trust agreement relative to a committee into the record, as follows:

A committee was constituted having power to bind the holders of every participation share as fully as if each such holder had expressly authorized or assented to each act or proceeding; to manage and control the trusts; to ascertain and determine

the income, apportion and direct the payment on the participation shares, as dividends, of any money or property applicable to such purpose; and generally to exercise such powers as should be required for the proper administration of the trust. The original committee consisting of eight persons was named, but the election of the committee subsequently by the shareholders was provided for, and it was provided that a member of the committee need not be a shareholder. The committee was given power to increase or decrease the number of trustees and to discharge any trustee. Annual meetings of the shareholders were provided for, at which the participation certificate holders were authorized to cast a vote for each participation share held. By the resolution of a majority of the shares any trustee might be removed and the trustees directed to terminate the trust. The trust might also be terminated by the request of a majority of the members of the committee and the First Trust and Savings Bank, and it should be terminated by the purchase of the property of the Chicago City Railway Company by the City of Chicago, pursuant to the ordinance of February 11, 1907. No holder of any bond, participation certificate or other security could terminate the trust or require any distribution of any of the securities other than in accordance with the terms of the agreement, and the death of any trustee, participation certificate-holder or committee member should not operate to terminate the trust, and the legal representatives of such a decedent should not terminate the trust or have a right to require an accounting.

32—*Stockholders May Pool Interests.*

Venner, the appellant, was the owner of 200 shares of the capital stock of the Chicago City Railway Company; one of his

objections to the trust agreement was the foregoing excerpt wherein, he claims, the stockholders of the Chicago City Railway Company have irrevocably deprived themselves of their deliberative powers and duties as stockholders, divested themselves of all control of the corporation and placed its management in the hands of strangers. The court did not adopt that view of the provision, and held that the stockholders might pool their interests for their own gain, saying:

"After the transfer of the securities by Cobe and McKinnon to the trustees, the beneficial ownership of the stock was represented by the participation certificates. Each holder of a participation certificate was a beneficial owner of the 169,719 shares of the stock of the Chicago City Railway Company in proportion to the number of his participation shares, and was also the beneficial owner of the stock of the other companies in the same proportion. Disregarding the other companies for the present, the effect of the transfer was to place the legal title of the majority of the stock of the Chicago City Railway Company in the trustees, together with the voting power which was thus separated from the beneficial ownership existing in the holders of the participation certificates, but was to be exercised in accordance with the latters' wishes, as expressed by a committee chosen by them for this purpose. Such a trust is not necessarily illegal. Ordinarily, men may make any disposition of their property they see fit, and they may, therefore, create a trust in their personal property for any purpose they deem best, so long as the purpose is not prohibited by statute or some rule of public policy. There is no statute of this State which prohibits a trust of the stock of a corporation for the purpose of controlling its management. There is no rule of public policy in this state which prohibits the combination of the owners of a majority of the stock of a corporation for

the purpose of controlling the corporation. On the contrary, it has been expressly held that a contract by the owners of more than one-half of the shares of stock of a corporation to elect the directors of the corporation so as to secure the management of its property, to ballot among themselves for directors and officers if they could not agree, to cast their vote as a unit as the majority should decide so as to control the election, and not to buy or sell stock except for their joint benefit, is not dishonest, violative of the rights of others or in contravention of public policy."

The court cites the case of Faulds v. Yates[26] in support of this view, and says: 'This case has been sustained by later decisions of this court;[27] and has been approved by the decisions of the courts of other states;[28] it has been cited by text writers announcing the law as therein stated;[29] and we regard the decision as sound in principle. It is as legitimate for a majority of stockholders to combine, as for other people. The fact that they expect 'gain and advantage' to accrue to them does not make the combination unlawful. That expectation and intent would have that effect only if the gain was to be at the expense of the corporation or in some way was intended to work a wrong on the other stockholders. If stockholders want to make their power felt, they must unite. There is no reason why a majority should not agree to keep together."[30]

In further discussion, the court says: "The stockholders can control the affairs of a corporation only through the elec-

[26] 57 Ill. 416.

[27] Higgins v. Lansingh, 154 Ill. 301, 40 N. E. 362; Kantzler v. Bensinger, 214 Ill. 589.

[28] Brightman v. Bates, 175 Mass. 105; Smith v. San Francisco and North Pacific Railway Co., 115 Cal. 584, 35 L. R. A. 309.

[29] Purdy's Beach on Private Corp., Sec. 704-2.

[30] Brightman v. Bates, supra.

tion of directors, and at every such election there is necessarily a combination of shares upon the persons elected. Such combination may be made at the time of the meeting, but there is no reason why stockholders may not agree beforehand to vote for certain persons as directors, and often they must do so in order to elect the persons desired. There is nothing in the law to prevent the owners of a majority of the stock from giving proxies to the same person. Unless restricted by its terms or by some statutory provision, a proxy confers on the grantee a discretion, unlimited either in character or duration, until revoked. A majority of the stockholders may, therefore, by uniting in the same proxy, confer upon an agent unlimited discretion to vote their stock, and there is no policy of the law to prevent their transferring the stock to a trustee with the like unrestricted power. It is the purpose for which the trust was created which must determine its legality. Besides those already cited, it has been decided in numerous cases,[31] that the pooling of stock by the owners for the purpose of electing directors and officers and controlling the management and business of the corporation was not against public policy so long as no fraud was committed or wrong done to the other stockholders. On the other hand, an agreement is invalid whose object gives unfair advantage to the parties to it and is not to the benefit of all the stockholders equally, except where one of the parties is to have a certain office at a certain salary; or the parties to the agreement are to receive the profits to be

[31] Ohio and Miss. Railroad Co. v. State, 49 Ohio St. 668; Griffith v. Jewett, 9 Ohio Dec. (Reprint) 627; Weber v. Della Mountain Mining Co., 14 Idaho 404; Mobile and Ohio Railway Co. v. Nichols, 98 Ala. 92; Hey v. Dolphin, 92 Hun. 230; Havemeyer v. Havemeyer, 43 Sup. Ct. N. Y. 506; Brown v. Pacific Mail Steam. Co., 5 Blatchf. 525.

made out of certain contracts to be entered into by the management under their direction; or the stock of the corporation is to be voted or its affairs managed by the determination of persons other than its stockholders or by a minority of its own stockholders.[32] Many of the cases relied upon by counsel for the appellant (Venner) are of this character, and were founded on the principle that the owners of a majority of the stock have no right to use their power to advance their own private interests at the expense of the minority. In others the complaints were made by parties to the agreement or purchasers from parties to the agreement, claiming that the agreement was not binding upon them but was revocable at their pleasure. Cases of this kind are not in point, for the appellant is not a party to the trust agreement and cannot complain of its terms unless his rights as a stockholder have been injuriously affected by it or will necessarily be injuriously affected.

33—*Directors Elected by Trustees.*

It is not correct to say that by this agreement the stockholders have deprived themselves of their deliberative powers or divested themselves of all control of the corporation. The management of the corporation is in the hands of its directors, elected annually. This election by the trustees, according to the direction of the committee selected by the participation shareholders who are the beneficial owners of the stock, is really an election by the stockholders through their proxies.

[32] Guernsey v. Cook, 120 Mass. 501; Shepaug Voting Trust Cases, 60 Conn. 553; Kreisel v. Distilling Co. of America, 61 N. J. Eq. 50; Cone v. Russell, 48 N. J. Eq. 208; White v. Thomas Inflatable Tire Co., 52 N. J. Eq. 178; Morel v. Hoge, 130 Ga. 625; Hafer v. New York, Lake Erie & West. Rd. Co., 9 Ohio Dec. (Reprint) 470.

i. e. their agents empowered to act for them These shareholders clearly have the right to agree, at every annual election, to have the vote of all of the shares cast as the committee then selected may determine. Whether the agreement binds all the shareholders so that they cannot withdraw from it is a question which does not concern the appellant. So long as the shareholders are satisfied and continue to act in accordance with it no one else has any right to complain. So far as this question is concerned, the fact that the shareholders, besides owning 169,719 shares of the stock of the Chicago City Railway Company, also own the whole stock of the other corporations, is immaterial. The appellant is interested only in the Chicago City Railway Company, and so long as that company is managed in a lawful manner with all due regard to his interests as a stockholder in it, he has no cause of complaint.

If the trust agreement had concerned only the stock of the Chicago City Railway Company, the appellant would have had no legal ground of complaint, because the participation shareholders, being the owners of the majority of the stock, had the right to control the election of directors and officers and the management of the business through their committee selected by themselves. The appellant contends, however, that the trust agreement placed the management and control of the corporation in the hands of outsiders, i. e., a committee selected by the holders of participation certificates and not by the stockholders of the corporation. The holders of the participation certificates are, however, the beneficial owners of the stock. The fact that they also own, jointly, by the same title and in the same proportions, all the stock of the other corporations, does not, of itself, necessarily affect their relation to the Chicago City Railway Company. If the affairs of that company are honestly and fairly conducted by its board of directors selected

by its own stockholders with due regard to the equal interest of all the stockholders, it furnishes no cause of complaint to the appellant that the majority stockholders are owners also of other corporations engaged in a similar or dissimilar business, or that they have committed the management of such other corporations to boards of directors composed of the same persons as the board of directors of the Chicago City Railway Company. The common ownership of the stock of the several corporations is not in violation of any law, and under the facts in the case imposes no liability or disability upon the owners which they were not under when holding the stock severally."

34—*Consolidation by Trust Agreement.*

Another point raised in opposition to the trust agreement was that the deed of trust practically effected a consolidation of the five street railway corporations by indirection; that there was unity of ownership and of management. It was argued that if the consolidation of these street railway companies were prohibited by the constitution or by statute, or if the effect of the arrangement among their stockholders were to destroy competition to the public injury, this trust agreement would be unlawful. Combinations and associations of corporations or of individuals by which the control of competing corporations is vested in a single ownership, with the effect of destroying competition, limiting production, enhancing prices or monopolizing business, are unlawful. They are manifestly injurious to the public and their illegal purpose subjects them to the condemnation of the law. It was claimed that the foregoing principle applied to this case, because the corporations concerned were subject to the prohibition contained in Section II of Article 2 of the constitution against the consolidation by any railroad cor-

poration of its stock, property or franchises with any other railroad corporation owning a parallel or competing line. On this question of consolidation the court said: "In our judgment that section of the constitution has no application to street railways, but refers to commercial railroads carrying freight and passenger traffic."

On the question of competition, the court ruled in the following language: "The City Council has the authority to declare the public policy of the city in regard to the operation of street railways, and the effect of its declaration is the abandonment of the principle of competition between such railways. The combination, union or merger of two or more street railway companies in the city of Chicago for the joint operation of their lines under a single management, is not now against public policy, but is in accordance with the declared purpose and desire of the city in regard to street railways."

35—*Transferring Shares to Qualify Director.*

The paragraph of the trust agreement authorizing the trustees to transfer shares to any person to qualify him as director or for the purpose of maintaining the organization of the company was attacked as being inconsistent with the charter of the Chicago City Railway Company which required its directors to be stockholders, and as showing conclusively that the original corporations maintained a formal organization only. Mr. Busby, the president of the Chicago City Railway Company, testified that some shares of that company's stock were transferred to him to qualify him as a director and the stock was really owned by the trustees of the Chicago City and Connecting Railways Collateral Trust. On this, the court says: "If the transfer of stock to a person for the sole purpose of qualify-

ing him as a director be regarded as violative of the rights of stockholders of the Chicago City Railway Company and of its charter, this provision would not vitiate the whole trust agreement. At the utmost it could only result in the disregard of the provision itself. The trustees might never make any transfers of shares for the purpose of qualifying a director and might lawfully carry out all the terms of the trust agreement without doing so. This provision is not an essential part of the trust agreement. The transfer to Mr. Busby is not shown to have been in violation of the charter of the Chicago City Railway Company, for it does not appear that he was not the holder of participation shares, and if so, he was already the beneficial owner of stock and the transfer only conveyed to him a legal title."

36—*Trust Does Not Imply Incorporation.*

It was insisted that the trust was unlawful because of its assumption of the name "Chicago City and Connecting Railways Collateral Trust;" which, it was said, was a fictitious corporate name, the assumption of which was a violation of Section 220 of the Criminal Code, and also subjected the appellees to a civil liability under Section 18 of the Incorporation Act. The court ruled on this question as follows: "The assumption of fact on which this claim is based is unfounded. The name does not imply a corporation. A trust does not imply a corporation, for it may or may not be incorporated."

37—*Merger Not Contrary to Law.*

The bill further alleged that the plans of the defendants extended to a consolidation of the stock, franchises, and property of the Chicago City Railway Company with various other pub-

lic service corporations in the City of Chicago and its vicinity, whereby all the elevated and surface street railway lines in the city and its vicinity, whether they were doing a competitive business or not, should be consolidated, merged or combined under one control and ownership, and the prayer included an injunction against such consolidation, combination or merger. The decision of the court on that part of the bill is as follows:

"It is admitted that the defendants desire to bring about a merger or consolidation of all the street railways and elevated roads in Chicago. It is not shown that they have attempted, or intend attempting, anything contrary to law. Counsel for the appellant says in his brief that the idea of getting legislative sanction for the merger is an afterthought, and that the plan the promoters have in mind is a voting trust. The record does not sustain this statement, and it is denied by the appellees. While anticipated unlawful acts of the directors of a corporation may furnish ground for an injunction, fear alone of such illegal action is not sufficient. There must be something more than the possibility of illegal action—something more than mere apprehension. The act to be enjoined must be one, the doing of which is actually threatened and may be expected with reasonable certainty, if not enjoined. The negotiation between the local transportation committee of the City Council and the local transportation corporations has not yet reached a stage where any definite plan has been evolved. Whether any plan ever will be adopted is uncertain. Until some scheme has been determined upon the possibility of injury to the appellant or of unlawful action on the part of the appellee is too remote to justify an injunction. The appellees cannot be enjoined from thinking about a consolidation, from discussing the feasibility of it, from taking the opinion of counsel, or even from endeavoring to obtain legislation to authorize it. There is no imme-

diate unlawful action imminent or threatened, and no occasion for the present issuance of an injunction."

38—*Summary.*

In an early case[33] the court says: "The grantor may declare any use or trust, or confer any power upon the trustees or others which he may choose, so that their object is not prohibited by law, by public policy or good morals, and it will be binding. He may declare the objects of the trust and confer the power to execute them upon the trustee or upon another." Again: "In general, any right, interest or thing which may be the subject of property may be granted in trust. Every kind of vested right which the law recognizes as valuable may be transferred in trust."[34] Finally: "There is no rule of public policy in this state which prohibits the combination of the owners of a majority of the stock of a corporation for the purpose of controlling the corporation."[35] Unlike the trust, corporations are not organized as a matter of right, they depend upon the state for a franchise for their existence. If they may combine under a trust agreement without acting against the public policy of the state, can it be said that individuals, in exercising their right to contract and to alienate property, commit an act against the public policy of the state in creating a trust?

[33] Morrison v. Kelly, 22 Ill. 622.

[34] Burke v. Burke, 259 Ill. 262, 102 N. E. 293.

[35] Venner v. Chicago City Railway Co., Supra.

CHAPTER III.

TRUSTOR, CREATOR OR SETTLOR.

39—*Who May Be.*

In general, every person competent to make a will, enter into a contract, or hold the legal title to property, has the power to create a trust, and he may dispose of his property in that way.[36] However, he must be possessed of the legal title and in addition to a mere intention to convey in trust, must make an actual conveyance.[37] The intention of a trustor is to be gathered from the trust instrument itself, read in the light of attendant circumstances known to him, or reasonably presumed to have been contemplated by him.[38]

40—*May Create for His Benefit or Others.*

The law is well settled that a trustor may convey his property in trust for his own benefit, or for the benefit of others.[39] He may create for his benefit and others, but he cannot settle it

[36] Skeen v. Marriott, 22 Utah 73, 61 Pac. 296; Haulman v. Haulman, 164 Ia. 471, 145 N. W. 930; Butler v. Badger, 128 Minn. 99, 150 N. W. 233.

[37] Reynolds v. Thompson, 161 Ky. 772, 171 S. W. 379.

[38] President etc. Harvard v. Atty. Gen., 228 Mass. 396, 117 N. E. 903.

[39] Colvin v. Martin, 68 App. Div. 633, 74 N. Y. Sup. 11; Dayton v. Stewart, 99 Md. 643, 59 Atl. 281; Whittemore v. Equitable Trust Co., 162 App. Div. 607, 147 N. Y. Sup. 1058; Mercer v. Safe Deposit & Trust Co., 91 Md. 102, 45 Atl. 865; Berry v. Dunham, 202 Mass. 133, 88 N. E. 904; Dorman v. Balestier, 175 N. Y. Sup. 677; Adams v. Nelson, 1 Ohio S. & C. P. Dec. 216; Mayo v. Moritz, 151 Mass. 481, 24 N. E. 1083.

in trust to pay the income to himself while exempting the property from liability for his existing debts.[40]

41—*May Act as Trustee.*

The trustor, in creating the trust, may declare himself a trustee.[41] To transfer personalty from the owner to a trustee for another, there must be a present and permanent change of title; where the owner makes himself the trustee, the title must pass from him individually so that he will hold the property for the beneficiary.[42]

42—*Revocation of Instrument.*

A voluntary settlement fully executed by a person of sound mind, without any mistake, fraud, or undue influence, is binding upon him and cannot be revoked, except so far as a power of revocation has been reserved in the deed.[43] Where a trustor does not misapprehend the contents of the deed creating the trust, and no power of revocation is reserved and no fraud or undue influence shown, the trustor is bound, though he overlooked some contingency.[44] In the absence of fraud, mistake, or some similar ground of relief, a settlor cannot, by failing to recognize the trust, or even by repudiating it, affect the rights of the trustee and beneficiary which have vested under the deed.[45]

[40] Rice v. Merrill, 223 Mass. 279, 111 N. E. 860.

[41] State v. Ellison, 216 S. W. 967.

[42] Citizens' Natl. Bank v. McKenna, 168 Mo. App. 254, 153 S. W. 521.

[43] Keyes v. Carleton, 141 Mass. 45, 6 N. E. 524; Drovers' Deposit Natl. Bank v. Newgass, 161 App. Div. 769, 147 N. Y. Sup. 4; Thorp v. Lund, 227 Mass. 474, 116 N. E. 946.

[44] Dayton v. Stewart, 99 Md. 643, 59 Atl. 281.

[45] Nichols v. Emery, 109 Cal. 323, 41 Pac. 1089.

CHAPTER IV.

TRUST PROPERTY.

43—*In General.*

One of the necessary elements of a trust is its property, and anything which may be the subject of property may be granted in trust. In general, any right, interest or thing which may be the subject of property and every vested right which the law recognizes as valuable, may be granted in trust.[46] A trust is said to exist whenever the legal title is in one person and the equitable title in another; or when the title is in one person and the ownership in another.[47] Trust property is not liable for the personal debts of the trustee, though any beneficial interest the trustee has in the estate may be reached by attachment or otherwise.[48]

44—*Purchasing by Trustee.*

The general rule is that one who occupies the position of trustee for the benefit of others is incapable of purchasing the trust property for himself, either at a public, private or judicial sale. In such case the beneficiaries have the option to affirm, or within a reasonable time set aside, the sale, and in case of affirmance, to require an accounting of the profits; no fraud on the part of the trustee so purchasing need be shown to give

[46] Burke v. Burke, 259 Ill. 262, 102 N. E. 293.

[47] Shelton v. Harrison, 182 Mo. App. 404, 167 S. W. 634.

[48] Barnes v. Spencer, 79 Ore. 205, 153 Pac. 47.

the shareholder the benefit of the purchase.[49] A party holding a fiduciary relation to trust property cannot, either directly or indirectly, become the purchaser of such property or transfer it to his own use for his own benefit; if he does, the sale or transfer is voidable and will be set aside at the mere pleasure of the beneficiaries, although such fiduciary may have paid a full price and gained no advantage.[50] Public policy is opposed to the unrestricted right of a trustee to acquire the property of a cestui que trust; a sale by a trustee to himself of the trust property is voidable at the option of the beneficiary, though the trustee may have given an adequate price and gained no advantage.[51]

Where trust property has been acquired by a trustee by direct dealing with the cestui que trust, the dealings are presumed to be invalid but will be supported if the trustee can establish that the cestui que trust acted voluntarily, with freedom from any influence arising from the trust relation, with intelligence, and full knowledge of all the circumstances.[52] To sustain a sale of trust property by the trustees to themselves individually —on the ground that an adult shareholder consented thereto— the evidence must show the good faith of the transaction, the adequacy of the consideration, a full knowledge of the facts, and independent thought on the part of the shareholder.[53] While a trustee may not buy the trust property at his own sale, or act inconsistently with his duties under the trust which require the strictest honesty and good faith in his dealings with his beneficiary, nevertheless, if the beneficiary be sui juris, and

[49] Hamilton v. Dooly, 15 Utah 280, 49 Pac. 769.

[50] Johnson v. United Rys. Co. (Mo.), 219 S. W. 39.

[51] Swift v. Craighead, 75 N. J. Eq. 102, 75 Atl. 974.

[52] Swift v. Craighead, Supra.

[53] Clay v. Thomas, 178 Ky. 199, 198 S. W. 762.

the contract between the parties fair and reasonable, untainted by fraud and undue influence, a conveyance of trust property by the beneficiary to the trustee will be upheld.[54] Though a trustee must act in good faith for the benefit of the shareholders, he is not precluded—where he has no control over the matter—from acting in his own behalf, and where he has an interest to protect he may buy in the trust property.[55] When the circumstances warrant it, a trustee may, by special application to a court of equity, obtain a decree under which he will be entitled to purchase and hold trust property freed from the trust.[56]

45—*Purchasing Beneficial Interests by Trustees.*

A trustee or an agent may purchase the trust property directly from the shareholders on condition: that the latter intend that the former shall buy; that the former disclose to the latter before the contract is made every fact he has learned in his fiduciary relation which is material to the sale; that he exercise the utmost good faith; that no advantage be taken by misrepresentation, concealment of or omission to disclose important information gained as trustee or agent; that the entire transaction be fair and open.[57] A purchase by a trustee of a beneficial interest in property, while regarded with suspicion, is not necessarily void and will be sustained if it clearly appears that there was no fraud, concealment, or undue advantage.[58] Any omission by the trustee or agent to disclose any

[54] French v. French, 58 Ind. App. 621, 108 N. E. 786.

[55] Hardwicke v. Wurmser (Mo. App.), 180 S. W. 455.

[56] Hamilton v. Dooly, 15 Utah 280, 49 Pac. 769.

[57] Byrne v. Jones, 159 Fed. 321.

[58] Murry v. King, 153 Mo. App. 710, 135 S. W. 107; Mills v. Mills, 63 Fed. 511.

fact material to the sale learned by him as trustee, any material misrepresentation, concealment, or other disregard of the condition renders the sale and the contract for it voidable at the election of the shareholders.[59] An agent or trustee may lawfully buy the property of his shareholder at a judicial sale caused by a third party, which he has had no part in procuring and over which he has no control.[60]

46—*Mingling with Other Property.*

The general rule is that where trust funds are mingled with private funds, the entire mixed fund is impressed with the trust to the extent of the trust, except as the owner of the private fund may separate his own from the trust fund;[61] the burden is on the trustee to show clearly the amount he has used out of his own funds in order to obtain credit therefor.[62] Where he neglects to keep a separate account of the interest received, he is chargeable with the highest legal rate of interest on the entire fund and can be allowed nothing for his services.[63] Where one intermingles trust property with other property so as to make it difficult, if not impossible, to prove the amounts of sale, a suit for an accounting in a court of equity may be maintained.[64]

47—*Following.*

Trust funds wrongfully converted may be followed into other

[59] Byrne v. Jones, Supra.

[60] Steinbeck v. Bon Homme Mining Co., 152 Fed. 333.

[61] Yellowstone Co. v. First Trust & Savings Bank, 46 Mont. 439, 128 Pac. 596; Moore v. First Natl. Bank, 154 Mo. App. 516, 135 S. W. 1005; Evans v. Evans, 200 Ala. 329, 76 So. 95; Fidelity & Deposit Co. of Maryland v. Rankin, 33 Okla. 7, 124 Pac. 71.

[62] Vanatta v. Carr, 299 Ill. 47, 82 N. E. 267.

[63] In re Hodges' Estate, 66 Vt. 70, 28 Atl. 663.

[64] Craft v. Craft, 74 Fla. 262, 76 So. 772.

property as far as they can be identified;[65] property impressed with a trust or the proceeds thereof, may be followed so long as it can be identified in the hands of subsequent holders who are not bona fide purchasers for value without notice.[66] Where a trustee conveys all or part of the trust property under mistake of fact to the prejudice of the shareholders, such conveyed property is subject to the equitable rights of the beneficiaries.[67] The right of the shareholders to pursue a fund and impose on it the character of a trust is based on the principle that it is the beneficiaries' property and not a right of lien against the wrongdoer's general estate, whether the property sought to be recovered is in the form in which the beneficiary parted with it or is in a substituted form.[68] No change of form of property divests it of the trust; the substitute takes the nature of the original and stands charged with the same trust; the authorized sale of trust property by a trustee discharges it from the trust and charges the proceeds of the sale—in the hands or under the control of the trustee—with the trust.[69]

Where a trustee purchases property with trust funds and takes title thereto in his own name, equity will regard such purchase as made for the benefit of the shareholder. The latter has the right to elect whether he will take the property or recover from the trustee the funds wrongfully diverted.[70] Al-

[65] Reaves v. Coffman, 87 Ark. 60, 112 S. W. 194; Evans v. Evans, Supra; McCormick v. McCormick's Admr. (Ky.), 121 S. W. 450; Wells v. Messenger, 249 Ill. 72, 94 N. E. 87.

[66] Teal v. Pleasant Grove Local Union, 200 Ala. 23, 75 So. 335.

[67] Teal v. Pleasant Grove Local Union, Supra; Pennington v. Smith, 69 Fed. 188.

[68] Heidelbach v. Campbell, 95 Wash. 661, 164 Pac. 247.

[69] United States v. Thurston Co. Neb., 143 Fed. 287.

[70] Red Bud Realty Co. v. South, 96 Ark. 281, 131 S. W. 340; Primeau v. Cranfield, 184 Fed. 480; Bohle v. Hasselbroch, 64 N. J. Eq. 334, 51 Atl. 508.

though no particular property can be identified as having been purchased or acquired, trust funds may be followed into the trustee's estate where it appears that they were mixed and commingled with the general funds and property of the trustee's estate and went into the general assets, either in the purchase of paper and securities or in the payment of the debts of the trustee. In such case the lien of the shareholder will attach against the entire assets of the trustee's estate for the payment of such claim.[71] Upon the conversion of trust property by the trustee, the beneficiary may recover in equity the value of the property, that being his only remedy when the property has passed beyond his reach; where a trustee has sold or pretended to sell the property to several different purchasers, so as to involve it in much vexatious litigation, the beneficiary could sue for its value instead of following the property.[72] The equitable remedy given a shareholder to follow trust funds into property—in which they may have been fraudulently invested by his trustee—is not taken away in most states by statutory provisions which afford a remedy by attachment or garnishment; the legal and equitable remedies are to be considered concurrent.[73] Where suit is brought by the trustee to recover trust property, or to recover for breaches of trust by former trustees, the beneficiaries are not necessary parties.[74]

48—Liability—Expenses—Fees.

It is a general principle that the trust estate should bear the expense of its administration, but it is chargeable only with

[71] State v. Bruce, 17 Idaho 1, 102 Pac. 831; Ellicott v. Kuhl, 60 N. J. Eq. 333, 46 Atl. 945.

[72] Sullivan & Co. v. Ramsey (Tex. Civ. App.), 155 S. W. 580.

[73] Chaves v. Myer, 13 N. M. 368, 85 Pac. 233.

[74] In re Lane's Will (Del.), 97 Atl. 587.

those expenses which are incurred for the benefit of all the shareholders.[75] It is self-evident that if a trustee has the power of managing an estate, he will be entitled to all the expenses of keeping it up such as hire of servants, salaries, costs of repairs, rebuilding and other like expenses.[76] Counsel fees of the trustee for general and special work such as protecting and defending the trust are paid from trust funds.[77] Taxes, interest and other expenses are generally to be charged to and paid out of the income of a trust fund, but where property is unproductive, such expenses are chargeable to the principle.[78]

The trust estate is liable for damages to one injured while in the employ of the trust; this rule of law is clearly and explicitly set forth in the case of Wright v. Caney River Ry. Co.[79] In this case Cornelia Wright, as administratrix of Turner Wright, deceased, filed suit August 1, 1907 against the Caney River Railway Company, C. J. Morrow, trustee for creditors of the Wood-Galloway Company operating the road at the time under a sub-lease, and Wm. Whitmer & Sons, Incorporated, original lessee of the defendant road and one of the principal creditors of the Wood-Galloway Company. On the trial there was evidence to show that on July 13, 1907, Turner Wright, intestate of plaintiff, an engineer, while operating an engine in one of

[75] Somerset Ry. v. Pierce, 98 Me. 528, 57 Atl. 888; Woddrop v. Weed, 154 Pa. 307, 26 Atl. 375; Baillie v. Caroline Interstate Bld. & Loan Assn., 100 Ga. 20, 28 S. E. 274.

[76] Ranzau v. Davis, 85 Ore. 26, 165 Pac. 1180; Laughlin v. Page, 108 Me. 307, 80 Atl. 753.

[77] Bay Biscayne Co. v. Baile, 73 Fla. 1120, 75 So. 860; West Texas Bank & Trust Co. v. Matlock (Tex.), 212 S. W. 937; Wilder v. Hart (Ky.), 96 S. W. 1106.

[78] Ogden v. Allen, 225 Mass. 595, 114 N. E. 862; Catt v. Wm. Knabe & Co., 93 Va. 736, 26 S. E. 246; Gisborn v. Charter Oak Ins. Co., 12 Sup. Ct. 277.

[79] 151 N. C. 529, 66 S. E. 588, 19 A. M. Case 384.

defendant's trains, was killed by the giving away of a defective trestle of defendant company's road, under circumstances indicating negligence on the part of the defendants. The defendants denied that the trestle was negligently constructed, claiming that it was caused to give away by the wrongful conduct of two boys in turning a stream of water on the foundation of the trestle, thus constituting an intervening negligence of responsible and independent agents as the proximate cause of the injury, and offered evidence in support of these allegations.

The defendants contended further, that in any event the defendant, C. J. Morrow, trustee, was not responsible for the wrong in his official capacity as trustee, nor could the trust funds held by him be subjected to the claim of plaintiff. It further appeared that by virtue of an attachment issued, there were funds of the company in the control and custody of the court available for satisfaction of the claim if it should be declared a valid charge against the trust estate. Judgment was for the plaintiff in the lower court, and the action was sustained on appeal.

49—*Trust Estate in Reference to Torts.*

The facts in the above case showed that the defendant company was organized under a charter conferring the power of eminent domain and the privilege of constructing tramways, railways, etc., for the transportation of passengers and freight, including logs, lumber, timber, etc., and while its chief purpose was, no doubt, to exploit certain timber lands and market the timber growing thereon, for all purposes relevant to the case, it was considered and held as a "railroad," subject to the regulations and liabilities affecting such companies, including the

statute known as the fellow servant act.[80] From this it followed that the defendant railway and the trustees in charge and control at the time were responsible for actionable negligence done in the operation of the road under the lease and in the exercise of the franchise.[81] It was chiefly urged for error that the defendant, C. J. Morrow, trustee, had been held liable in his official capacity, and the trust fund subjected to the payment of this claim; but the court in substance said:

"We are of opinion that on the facts presented the objection cannot be sustained. It is true as a general rule that a trust fund cannot be subjected to legal liability by reason of the torts of the trustee or his agents and employes; but this doctrine ordinarily exists in the case of passive trusts, or when active in those instances where the power and duties of the trustee are so defined and restricted by the law, or the provisions of the instrument under which he acts, that the principle of imputed responsibility similar to that which obtains in the case of principal and agent does not and cannot prevail. Thus, in McLean v. McLean,[82] and several cases of like import cited and relied upon by defendants, it was held that a liability arising out of a transaction with an executor or administrator is personal in its nature, and will not, as a rule, be considered as an obligation of the estate. This is on the ground that these officers act under power conferred by the law for the purpose of settlement and distribution according to facts and conditions existent at the time of the death of the de-

[80] Priv. Laws 1897—p. 83, c. 56; Hemphill v. Railway, 141 N. C. 487, 54 S. E. 420.

[81] Mabry v. Railway, 139 N. C. 388, 52 S. E. 124 citing Harden v. Railroad, 129 N. C. 354, 40 S. E. 184, 55 L. R. A. 784, 85 Am. St. Rep. 747; Logan v. Railroad, 116 N. C. 940, 21 S. E. 959; Aycock v. Railroad, 89 N. C. 321.

[82] 88 N. C. 394.

ceased, and the power to charge the estate or create liabilities against it is not recognized, unless contained in the will. Though even here if it is shown that an obligation has been assumed by an executor for the protection of the estate and has inured to its benefit, its payment will usually be allowed in an account with the distributees. But no such limitation can be allowed on the facts presented here. It appears that the Wood-Galloway Company, a corporation, owners of large timber interests in the counties of Mitchell and Yancey and elsewhere, and also of large amounts of lumber placed in various yards in said counties, estimated at several millions of feet, having become embarrassed, on the 7th day of June, 1907, conveyed the same to C. J. Morrow, trustee, with power to haul out and market said lumber and dispose of the timber lands and other property conveyed, and distribute the proceeds among the creditors mentioned and described in the deed; that on the 5th day of June, 1907, two days before the date of the said deed, the Wm. Whitmer & Sons, Incorporated, one of the principal creditors of the Wood-Galloway Company and cestuis que trust in the said deed, sublet to the trustee in same the railroad company for carrying out the purposes of the trust, and the trustee took charge of the road and was using and operating the same in hauling out the lumber, and otherwise carrying out the purposes of the trust, when the intestate was killed. Among others, the instrument contains the following provisions:

50—*Provision for Trustee's Duties.*

"For the purpose of carrying this trust into effect, it shall be the duty of C. J. Morrow, trustee, aforesaid, after giving a bond in the sum of fifteen thousand ($15,000.00) Dollars, with

good and sufficient security to be approved by the Unaka National Bank and City National Bank of Johnson City, Tennessee, to take charge at once of all said property for the benefit of said creditors, to take an invoice of the whole of said property as early as practicable and as convenient, and to furnish a copy of said invoice to each of the creditors above named; to deliver immediately said lumber on sticks in piles or other conditions on board the cars at Huntdale, North Carolina, from there to be shipped under the direction of Wm. Whitmer & Sons, Incorporated, who are to receive 5 per cent. commission on entire sale of lumber and trade discount 2 per cent. thirty days for shipment, the said trustee making copies, one of which shall be preserved by said trustee, one to be forwarded to the said Whitmer & Sons, Incorporated, and the third to be deposited in the Unaka National Bank of Johnson City, Tennessee, for the use and benefit of the said creditors hereinabove named, and further copies to each of the other creditors above named.

It shall be the duty of the trustee aforesaid to make an estimate of the quantity and value of all the standing timber or timber remaining uncut of every character and description and to furnish a copy of said estimate to Wm. Whitmer & Sons, Incorporated, and deposit one copy with the Unaka National Bank of Johnson City, Tenn. and each of the above creditors above named for the use and benefit of the creditors hereinbefore named, and retain a copy of same in his own offices which shall be subject to the inspection and examination by said creditors at any and all times, to be done at as early a date as practicable and convenient, to sell all the said standing timber remaining uncut for cash to the best advantage to all the parties therein concerned; and to make sale and disposition of the aforesaid timber it shall be the duty of the trustee aforesaid,

before any offer for said timber shall be accepted, to submit the price in writing to the creditors hereinbefore named; that the said trustee shall make monthly statement of the amount realized from the sale of said lumber and timber on or before the first day of each month, and he shall at no time retain in his possession or control a sum greater than five thousand ($5,000.00) Dollars of the proceeds of said sale; but he shall at all times deposit and keep on deposit at the Unaka National Bank of Johnson City, Tennessee, proceeds of said sale of the said timber and lumber, and shall distribute and prorate the money arising from said sale among the creditors herein named, less the expense of handling the same and the operating expenses of the Caney River Railway Company, which he may deduct from any moneys in his hands, furnishing an itemized statement on or before the first of each month of all expenses in conducting the said operation, and whenever he shall have on hand a sum equal to five thousand ($5,000.00) dollars, the same shall be distributed among the creditors herein named by prorating the amount according to the respective amounts due and owing each of the creditors above named. The said trustee shall receive as a salary the sum of ($125.00) per month and his expenses from the time he enters upon his duty and until he discharges his trust, the same to be deducted and retained monthly in his monthly statement of expense. It is further understood and agreed between the Wood-Galloway Company and the bank creditors above named, that the said creditors shall have the right and it shall be their duty to furnish a competent inspector to inspect said lumber whose duty it shall be to inspect and grade all such lumber, observing the rules prescribed by the National Hardwood Lumber Association, and the books and records of said parties concerned, their agents or representatives, to this transaction."

51—*Trustee Liable in His Official Capacity.*

It will thus be seen that under a lease to him in his capacity as trustee and under the powers contained in this deed inter partes, the defendant, C. J. Morrow, in the use and operation of the railroad, was acting throughout with the sanction and for the benefit of the creditors, the cestuis que trust, and to a large extent under their supervision and control, and should be held responsible certainly to the extent of the property conveyed and in evidence for both the contracts and torts of their trustee, made and committed within the scope of his powers and in furtherance of their interests.[83] Not only is this true under the general principles of imputed responsibility indicated in these cases, but, on authority more directly apposite, the defendant Morrow should be held liable in his official capacity. Thus, in Mersey Docks Board v. Gibbs, Lord Westbury lays down the proposition that trustees may render the property of their beneficiaries liable to third persons for an act done by them in the exercise of their trust; and in Bennett v. Wyndham, De Gex, Fisher & Jones, vol. 4, p. 359, it was held that trustees should be indemnified out of the trust estate by reason of a recovery had against them for negligence of employes in carrying out an order given in the management of the estate. Applying the same principle in the case of Miller, Trustee v. Smythe,[84] the court held that where a trustee legally and rightfully assumes in his representative capacity the relation of landlord, he is liable, in that capacity, to answer to the tenant for the violation of any duty which the general law attaches as an incident to that relation. Accordingly, where a trustee,

[83] Sawyer v. Railroad, 142 N. C. 1, 54 S. E. 793, 115 Am. St. Rep. 716; Jackson v. Tel. Co., 139 N. C. 347, 51 S. E. 1015, 70 L. R. A. 738.

[84] 92 Ga. 154, 18 S. E. 46.

duly authorized, rents a store belonging to the trust estate, and in the contract of rental agrees to keep the shelving in the store in thorough order and repair, the trust estate is liable for damages occasioned by his failure so to do. A ruling substantially similar has been made by our own court in Cheatham v. Rowland.[85] In that case it was held that the trust fund could be subject to a liability created by the trustees in the performance of their duty concerning the trust property, and that the trustee only was required to be made a party in order to afford appropriate relief.

The cases cited and relied upon by counsel for defendant, or some of them, seem to have proceeded on the principle that the acts of the trustees by which a liability was sought to be imposed upon the trust estate were not within the scope of the powers contemplated and conferred by the deed, or they were cases where the estate and the entire dominion over it for the purpose of the trust were placed in the trustee, and the beneficiaries had no right of interference and control in its management. In Parmenter v. Barstow, et al., Trustees, plaintiff passing along the highway had her eye injured by chips and pieces of stone flying in her face, and attributed it to the negligence of defendant's agents and servants engaged in cutting and chiseling stone on the premises. The facts of this case are not given with sufficient fullness to enable us to consider it satisfactorily in reference to the question presented here; but it does not appear in any report of the case to which we have access that the trustees were occupying the premises or carrying on the business indicated in furtherance of the trust, or that the beneficiaries had any direct interest in or control over it of any kind. So in Falardeau v. Boston Art Students' Associa-

[85] 22 R. I. 245, 47 Atl. 365, 63 L. R. A. 227.

tion,[87] the entire interest in a lease on a building was assigned to trustees for the remainder of the term, and responsibility of the corporation, the assignor, for negligence of the employes and servants of the trustees in the management of the building was denied, because it appeared that the trustee had the entire and exclusive control of the property, and the employes could in no sense be considered the agents of the corporation.

But in our case, the beneficiaries were parties to the deed. The operation of the road for their benefit was clearly contemplated, its expenses provided for, and they were expressly given the right of interference and control in the main purpose of the trust, to wit, the disposition of the lumber, etc. Other decisions apparently adverse were rendered on the ground that the claim was asserted in a court of law, and a recovery could not be made effective without threatening the integrity of the trust fund and the entire frustration of its primary purposes; but no such objection can obtain here in a court having full jurisdiction of legal and equitable issues and where a part of the trust fund is in the control and custody of the court and available in satisfaction of the claim.

52—Liability May be Limited by Stipulation.

We must not be understood as questioning in any way the position upheld in Taylor v. Mayo,[88] to the effect that a trustee is personally bound for his contract or acts done in the management of the estate, unless it is otherwise expressly or clearly stipulated. In Mitchell v. Whitlock, supra, the principle referred to is thus stated: 'A trustee purchasing goods or in-

[87] 182 Mass. 405, 65 N. E. 797.
[88] 110 U. S. 330, 4 Sup. Ct. 147, 28 L. Ed. 163 and Mitchell v. Whitlock, 121 N. C. 166, 28 S. E. 292.

curring any other liability is personally liable for the payment thereof, unless his liability is limited by an agreement expressed or implied with the creditor.' In Taylor's Case, supra, it appeared that Charles Davis, a retiring trustee, having a claim for fees and expenses giving him a lien on the trust assets, turned over the fund to his successors who gave him their written obligation signed as trustees, that they would apply the funds of the estate in payment of his claim as they came to hand. The estate having become insolvent and the assets exhausted, in suit by the administratrix of Davis, the trustees were held individually liable, and the principle was declared: 'That if a trustee contracting for the benefit of the trust wants to protect himself from individual liability in the contract, he must stipulate that he is not to be personally responsible, but that the other party is to look solely to the estate.' But in neither of these cases was it held that the trust estate could not also be held responsible to the creditor, or that the defendants, the succeeding trustees, on payment of the demand, could not be reimbursed from the funds of the estate if there had been such funds available for the purpose. In the present case, no doubt, the defendant Morrow could have been sued and held liable as an individual, because the intestate was one of his employes; but responsibility also attaches to the trust estate, and will be imputed to the beneficiaries who are parties to the deed and were allowed and took part in its actual management and control. There is no reversible error shown and the judgment below is affirmed."

Where trustees are given power under a deed of trust to conduct a business as if they were the absolute owners of the trust property; and the deed provides that no responsibility whatever shall result to the trustees by reason of mis-conduct of agent or employes and no liability shall attach to them, the

estate and not the trustees is liable for a negligent act of employes or agents of the trust.[89]

53—*Not Liable for Trustees' Private Debts.*

Trust property cannot be sold on execution for the payment of the debts of the trustee in his individual capacity; judgments against such trustee are not liens upon the trust property;[90] nor can a valid judgment be rendered against trustees in their representative capacity on an obligation not incurred by them in such capacity.[91]

54—*Distribution.*

The trust instrument should provide that the trustees distribute the profits and dividends to the beneficiaries from time to time as the trust estate may warrant. The trustees may not anticipate the time for the distribution of the trust fund or property itself; and they may not distribute the trust fund or property prior to the time stated in the trust deed without first filing a petition in a court of chancery asking approval, and upon proper orders being entered they may pro-rate the trust funds among the shareholders.[92]

55—*Shareholders Interest—Personalty.*

The beneficial interest one may have in a trust is evidenced by certificates of interest or shares, whether this interest is personal property or real estate depends in a measure on the language of the trust and to what extent the trust property is

[89] Prinz v. Lucas, 210 Pa. 620, 60 Atl. 309.

[90] Wright v. Franklin Bank, 59 Ohio 80, 51 N. E. 876.

[91] Frost v. Thompson, 219 Mass. 360, 106 N. E. 1009.

[92] Chapin, Petitioner, 148 588, 20 N. E. 195, 2 L. R. A. 768, 26 R. C. L. 1377. See Simmons Hardware Co. v. Warbel, 1 S. D. 488, 47 N. W. 814, 36 A. S. R. 755, 11 L. R. A. 267.

to be controlled by the beneficiaries. The rule is that where the power to manage and control the trust property which is real estate is in the beneficiaries, and the trustees are subject to their will, then a partnership is created and in that case beneficial interests may be deemed realty. In addition to the trustees' being clothed with complete jurisdiction over trust property, a provision in the declaration of trust should specifically declare that certificates of interest are personal property for all purposes, and not real estate. This principle that beneficial interests are personal property is definitely stated in the case of In Re Pittsburg Wagon Works' Estate.[98] Here a portion of the stockholders of the Pittsburg Wagon Works created a trust for the purpose of buying in a mortgage of the corporation. The trust bought the mortgage and then foreclosed; W. J. Kountz, as trustee, took title to the property on foreclosure sale; at his death his wife claimed an interest in this real estate. The facts as taken from the reports are as follows:

W. J. Kountz and some other stockholders of the Pittsburg Wagon Works, a corporation engaged in the manufacture of wagons and agricultural implements, formed themselves into an association with a capital stock of $30,000 for the purpose of purchasing a claim against the corporation amounting to $37,500. This claim was a mortgage held by John R. McCune and others. On October 30, 1883 the association adopted by-laws the first section of which provides that "this company shall be called the 'Pittsburg Wagon Works Association.' The capital stock shall consist of $30,650 and shall be divided into 613 shares of the par value of $50. each." The by-laws further provided that "the legal right to all property of this company shall be held by one person," and that the title should be for the

[98] 204 Pa. 432, 54 Atl. 316.

time being in his own proper name, with the addition thereto of 'trustee of the Pittsburg Wagon Works Association,' in trust for the use, benefit, and behoof of the company. A two-thirds vote of the shares of the stockholders was necessary to authorize the trustee to sell, assign, transfer, or incumber the property. Section 3 further provided as follows: "The stock shares and interest of and in this company shall be assignable and transferable by the holder thereof in person or by attorney only on the books of this company, which books the secretary shall cause to be kept, showing the names of stockholders and the respective amount of stock held by each—in the presence of the president or secretary—and upon such transfer the assignee of such share or shares shall thereby as to such share or shares succeed and become subject to all the rights and obligations of an original party thereto."

The association purchased the mortgage against the real estate of the Pittsburg Wagon Works, and by proceedings thereon sold the same at sheriff's sale in March, 1880, the association becoming the purchaser, and the title being taken in the name of the trustee. By virtue of an execution issued on a judgment against W. J. Kountz, his interest in said real estate was sold on November 30, 1883 and Peninah W. Kountz, the appellant's testator, became the owner. It was claimed that the mortgaged premises were held by the association as real estate and that W. J. Kountz's interest therein passed to Mrs. Kountz by virtue of the levy and sale on the execution. The appellant therefore contended that he was entitled to the interest of W. J. Kountz in the association—being 230 shares of the capital stock thereof—and to that extent to participate in the proceeds of this real estate sold by the trustee under the Price Act. The court in passing on this question said:

"The learned auditor and court below correctly held that the

interest of W. J. Kountz was personalty and not real estate, and that the levy on the execution created no lien on the real estate held by the association and that the sale by the sheriff vested no interest in the real estate in Mrs. Kountz. The association was formed for the purpose of purchasing the mortgage against the Pittsburg Wagon Works. Having secured the mortgage, the association was compelled to enforce the payment of it by a sale and purchase of the real estate. The by-laws adopted October 30, 1883, fixed the character of the real estate held by the association. As we have seen, they require the title of the association's property to be in the name of the trustee, and not in the names of the individual members. The interest of any member is determined by the number of shares he holds in the capital stock of the company. He could only dispose of his interest by transferring on the books of the company, in the presence of the president or secretary, his shares of stock to the purchaser who should 'thereby as to such share or shares succeed and become subject to all the rights and obligations of an original party thereto.' Such was the nature and character of the interest of W. J. Kountz in the Pittsburg Wagon Works Association in November, 1883 and it is clear that it was not subject to levy and sale as real estate."

There was another question as to sixty-five shares of the trust which the court disposed of as follows: "The auditor and court below awarded the Spiking and Chadwick interests (65 shares) in the association to the appellant, but he complains in his first assignment that the auditor erred in finding 'that it has been shown by clear and satisfactory evidence that Mrs. Peninah W. Kountz had, at the time of the purchase from W. D. Spiking, or at the time of the purchase from Joseph Chadwick, a separate estate out of which she made said purchases or any of them.' This finding becomes immaterial in

view of the fact that we have this day quashed the appeal at No. 183, October term, 1902 which assailed the correctness of the auditor in holding that appellant was entitled to their interests in the association.

We have held that Mrs. Kountz took no title to W. J. Kountz's interest in the real estate of the association or in the association itself by virtue of the sheriff's sale, and it follows that she has no standing to contest the right to said interest in the association of John Phillips, trustee of the Manchester Savings Bank, to whom it was awarded by the auditor. She, having no right to the interest, is not in a position to question the disposition of it by the auditor, and hence the sixth assignment of error cannot be sustained."

A certain sum of money was allowed as commission and another amount for professional services. The validity of these sums was put in question and in disposing of them and making distribution of the interest money which was on hand, the court said: "Under the testimony in the case, we are not convinced that there was error in allowing the credits claimed by the accountant for commission and for professional services. The interest which has accrued on the fund for distribution should be distributed in proportion to the shares in the association held by the respective claimants."

56—*Shareholders Interest—Real Estate.*

Certificates representing interests in a trust are treated as real estate where the beneficiaries have control by reason of their power to elect the trustees, or where the trustees are merely their agents who carry out the business policy as outlined and dictated by the beneficiaries. In the case following, the court draws the distinction and shows the reason for beneficial interest

in one trust being personal property, and in the other real estate. In the case of Priestley v. Burrill,[94] three trusts were involved in one suit: Homan's Real Estate Trust, Boston Real Estate Trust, and Warren Chambers Trust.[95] The Supreme Court of Massachusetts decided, in reference to the question on taxation, that in two of the trusts the shares were personalty and in the third, the shares were real estate; this decision was based on the power given the beneficiaries in the different trusts. In two of them the trustees were given absolute control of their own actions and no power was given the shareholders to elect trustees. In the third—where the court held that the beneficial interests were subject to a real estate tax—the shareholders had the power to elect the trustees. The facts may be gathered from the decision which in general is as follows:

Charles Homans Priestley died on September 4, 1916, domiciled in England. The petitioner, who was the ancillary executor of his will, brought a petition to determine whether certain shares in trusts of Massachusetts real estate were subject to a legacy and succession tax. The court said: "Undoubtedly these shares constitute property within the jurisdiction of the commonwealth, and would have been taxable to nonresidents before the enactment of St. 1912, c. 678,[96] that statute, continued by St. 1916, c. 268, Section 1, confined the tax in case of nonresident decedents to real estate within the commonwealth or any interest therein. If the shares owned by this nonresident decedent constitute real estate or an interest therein, they are taxable, but not otherwise.

In the recent case of Dana v. Treasurer and Receiver Gen-

[94] 230 Mass. 452, 120 N. E. 100.

[95] Copies of these three trust instruments are to be found in the Appendix.

[96] Peabody v. Treasurer and Receiver General, 215 Mass. 129, 102 N. E. 435.

eral,[97] the question arose whether similar shares in the Amoskeag Manufacturing Company and the Boston Ground Rent Trust, two real estate trusts, were real or personal estate or partly each. The beneficial interest in the trust was divided into transferable shares; the real estate and personal property constituted one trust fund, and it was expressly provided that at the termination of the trust the trustees should liquidate the assets and distribute the same among the shareholders, but there was no provision authorizing the trustees to divide the real property among them. It was held that the real estate was to be considered as converted into personal estate from the beginning, and that consequently the shares were personal property.

In the case just cited the court held that the beneficial interest in the trust was personalty for the reason that the shareholders could not control the actions of the trustees; and for the further reason that in construing the trust, the trustees had the power to dispose of the property and pro-rate the proceeds among the shareholders. In Homans Real Estate Trust there is a provision that the trustees shall have entire control and management of the trust property and in case one of the trustees ceases to be a trustee before the termination of the trust, his successor shall be appointed by the Old Colony Trust Company. This last provision clearly excludes the beneficiaries from controlling the trust through the trustees. The Boston Real Estate Trust provides that the trustees shall have absolute control over and disposal of all real estate held by them, and in case of any vacancy from any cause at any time in the number of said trustees the vacancy shall be filled by the remaining trustees. The court, in comparing these two trusts with the one in the Dana case, said:

97 Dane v. Treasurer and Receiver General, 227 Mass. 562, 116 N. E. 941.

"As respects the shares in the Homans Real Estate Trust and the shares in the Boston Real Estate Trust, the present case cannot be distinguished in principle from the Dana Case. The essential facts are similar, and the general scheme of each of these trusts worked a conversion of all the property of the trust into personalty as one fund from the outset. The deceased testator had no interest in the real estate of either the Homans Real Estate Trust or the Boston Real Estate Trust which would go to his heirs, but an interest in the net proceeds of the trust fund after the sale of all the property. Indeed the Homans Real Estate Trust agreement expressly provided that shares hereunder shall be personal property. We are of opinion that these shares belonging to the estate of a nonresident and not constituting any interest in real estate are not subject to a succession tax."

At this juncture the court takes up the third trust in the suit and says that in the trust agreement of the Warren Chambers Trust there is no such imperative requirement that the property shall be sold and the proceeds distributed among the shareholders. The trustees could transfer the property to a corporation, if instructed by the shareholders to organize one; but they were authorized to sell the property at the expiration of the trust only in default of action relative thereto by the shareholders. This means the shareholders had the right to dispose of the property, they had full control, and the trustees as such could sell only upon default of the shareholders to act. The court found the trust agreement contained no provision that the shares should be personal property as to title, whatever the legal effect of such a clause might be, and says: "That there was no equitable conversion of this real property into personalty at the creation of the trust, or at the death of the testator, is virtually settled by the decision in the Dana case

relating to the Duluth and Gladstone Real Estate Trust."

The Warren Chambers Agreement and Declaration of Trust provided for the filling of a vacancy in the number of trustees by the trustees until the next annual meeting of the shareholders or until a special meeting might be called for that purpose. This provision expressly placed the appointment of trustees in the shareholders, it gave them control of the trust; this seems to be one of the determining elements as to whether the instrument creates a pure trust or a partnership. In commenting further the court said:

"This trust agreement, in our opinion, created a partnership relation among the certificate holders as distinguished from a pure trust. They are associated together, have a fixed annual meeting, and special meetings upon the written request of the holders of one-tenth of the shares; they are empowered to fill any vacancy existing in the number of trustees, and may remove any or all of them and elect others in their place. After the erection of the new building, the trustees can incur no debt or liability except such as may be incidental to the management of the property held by them, and then only for an amount not exceeding in the aggregate at any one time ten thousand dollars; they are specially authorized to mortgage the premises purchased and the buildings they may erect thereon for a specified amount but not for a larger amount; and no sale of the real estate can be made by them unless authorized by vote of the shareholders. In short, the certificate holders are associated together, they control the property, and for convenience have placed the legal title to it in trustees as their managing agents.[98] Under the Massachusetts rule, while partnership real estate is personalty so far as necessary to pay the debts of

[98] Williams v. Milton, 215 Mass. 1, 102 N. E. 355.

the firm, it is real property for all other purposes. The decedent, as one of the partners, had a beneficial or equitable interest in the real estate of the Warren Chambers Trust; and however that interest may be defined, it was 'real estate within the Commonwealth or any interest therein,' and as such was subject to a succession tax by the express terms of St. 1909, c. 490, part 4, Sec. 1, as amended by St. 1912, c. 678, and St. 1916, c. 268.[99]

In summary, the court held that the beneficial interest in the Homans Real Estate Trust and the Boston Real Estate Trust was personalty, for the reason that in these trusts the title and control of the trust property was in the trustees; in the Warren Chambers Trust, the beneficial interest was real estate, for the reason that the control of the trust and trustees was in the shareholders, thereby creating a partnership.

[99] Kinney v. Treasurer and Receiver General, 207 Mass. 368, 93 N. E. 586, Ann. Cas. 1912A, 902, 35 L. R. A. (N. S.) 784; Kennedy v. Hodges, 215 Mass. 112, 102 N. E. 432; Peabody v. Treasurer & Receiver General, 215 Mass. 129-31, 102 N. E. 435; Frost v. Thompson, 219 Mass. 360, 106 N. E. 1009; Hawkridge v. Treasurer and Receiver General, 223 Mass. 134, 111 N. E. 707.

CHAPTER V.

CERTIFICATES—BENEFICIAL INTERESTS—SHARES.

57—*History.*

Transferable shares in unincorporated companies, joint-stock associations, and partnerships have been recognized as valid in commerce and law for several centuries past. As the law of partnership developed and general and special partners became more common, certificates were issued to show the interest and the nature of the interest in the partnership business. The issuing of a certificate became a ready means to raise money in all sorts of enterprise. In England, during the early part of the eighteenth century, a great number of frauds were perpetrated by unscrupulous schemers; companies were organized for the development of the wildest flights of fancy; all that was necessary was to open a subscription book, spin a pleasing yarn around the proposed enterprise, and the money was raised; and that was the end of the business. To put a stop to these chimerical speculations and stock gambling, parliament passed what was known as the Bubble Act. This act had the desired effect and was in force for over a hundred years. In construing this act, it was determined that it was directed against those companies whose purposes were mischievous, and it was said that it was not an offense at common law for an unincorporated company to have and to issue transferable shares.[100]

[100] King v. Webb, 14 East 506; Thompson on Business Trusts, 22.

58—*English Rule.*

It was well established from a very early date in England that joint-stock companies might issue shares as a matter of right, and in passing on this particular point the master of the rolls said:[1] "I have listened in vain for any case, or indeed, for the statement of any principle, whereby at common law, and independent of any statute, a partnership between persons who agree among themselves that their shares shall be legally assignable in perpetuum, or indefinitely assignable, is absolutely void and illegal. I find no case which determines it and no principle upon which it can rest, nor am I able to conjecture why such an association should be void at common law. It does not appear to me to offend against society, or to injure any class of individuals, and, therefore, unless bound by distinct authority, I should not be the first judge to hold that such an association was void at common law."

59—*American Rule.*

Trusts, partnerships and unincorporated associations have issued, without question, certificates of beneficial interest and share certificates from the very inception of the country. The Supreme Court of Illinois recognized the right of a trust to divide its property into shares,[2] for the Court incorporated a portion of the trust agreement in its decision when it says: "Article 4 fixed the amount of the capital stock at $100,000.00 to be divided into 1000 shares of $100. each, that being the estimated cost of the lands owned and to be owned by the Associa-

[1] In re Mexican v. S. A. Co., 27 Beav. 474, 6 L. R. A. (N. S.) 665.

[2] Hart v. Seymoure, 147 Ill. 598, 35 N. E. 246; Venner v. Chicago City Ry. Co., 258 Ill. 523, 101 N. E. 949.

tion." It may be taken as firmly established that the privilege or raising and issuing transferable shares is a common law right, and not a privilege peculiar to corporations.[3] The leading case in which this rule is set forth is Phillips v. Blatchford;[4] the facts are as follows:

On or about June 1, 1874, certain persons entered into a copartnership styled the Ryder Reciprocal Grate Association under a declaration of trust by the terms of which no member, as such, was to have any control over the business of the association which was to be entirely under the control of a board of managers of whom the trustee was to be a member, and the other members were to be elected by the shareholders. The stock was to be divided into fifteen hundred shares, and each holder of a share was entitled to a certificate which might be transferred by an assignment in writing. The following provision was made in case of the death of a member: 'The decease of a member of the association shall not work a dissolution of it, nor shall it entitle his legal representatives to an account, or to take any action in the courts or otherwise against the association or the trustee for such; but they shall simply succeed to the right of the deceased to the certificate and the shares it represents, subject to this declaration of trust.'

The defendant's testator (Scudder) became the owner of one hundred and twenty-five shares in the association on or about June 1, 1874, and was such owner at the time of his death on August 28, 1875. On October 11, 1875, the defendant and John P. Putnam, since deceased, were appointed executors of his will.

[3] Thompson-Business Trusts, 23; Sears Trust Estate (2d. ed.) 105.

[4] 137 Mass. 510.

The association in the prosecution of its business became indebted to the Taunton Iron Works Company; this indebtedness was incurred partly before and partly after the death of Scudder. On June 18, 1878, the Taunton Iron Works Company brought an action against the plaintiff and other members of the association, to recover the debt. On November 12, 1880, the plaintiff and Sylvanus N. Staples each paid one-half of the amount of said claim, which amounted in the whole to the sum of $6934.78. The association also became indebted in the sum of $1625.27 to the firm of Staples and Phillips, which firm was composed of the plaintiff and Sylvanus N. Staples, and on February 28, 1879, said indebtedness was paid by the plaintiff by the account being charged to profit and loss on the books of the firm.

The number of shares in the association held by solvent persons in Massachusetts was one hundred and eighty-nine; and on November 12, 1880, the plaintiff presented a petition to the Probate Court, setting forth the payment by the plaintiff of the claim of the Taunton Iron Works Company and the liability of Scudder to the plaintiff growing out of such payment; the probate court, on December 20, 1880, ordered the executors of the will of said Scudder to retain in their hands the sum of $4000 until the rendering of final judgment in any suit at law or in equity commenced within one year after payment of the claim. The prayer of the bill was that the defendant be ordered to pay 125/189 of the claims paid by the plaintiff, and for further relief.

The answer admitted the allegations of fact contained in the bill; alleged that the bill did not set forth any ground for relief in equity; and that the causes of action accrued within two years from the date of the defendant's giving bond as executor, or, if such causes of action accrued after two years, that they

accrued more than one year before the commencement of the suit.

The case was heard by Field, J., upon the bill and answer, and reserved for the consideration of the full court.

60—*Partnership Shares Legal.*

Holmes, J. It is too late to contend that partnerships with transferable shares are illegal in this commonwealth. They have been recognized as lawful by the court, from Alvord v. Smith,[5] to Gleason v. McKay.[6]

Even if the question were a new one, we should come to the same result. The grounds upon which they were formerly said to be illegal in England, apart from statute, have been abandoned in modern times.[7]

It is suggested by the defendant that such associations are intended to avoid having a paid-up capital, which would be necessary if a corporation were formed, and to escape taxation. These new reasons peculiar to this State derive no support from the English decisions invoked and do not impress us. If a partnership incurs debts, the members are personally liable, and there is no need of a paid-up capital. And an association does not become illegal simply because another very like it is taxed. We perceive no wrong to the public; and as to the shareholders, if they choose to purchase stock in a partnership with unlimited personal liability, it is their own lookout. Courts will not assume to understand the interests of contracting parties better than they do themselves.

[5] 5 Pick. 232.

[6] 134 Mass. 419.

[7] Walburn v. Ingilby, 1 Myl. & K. 61, 76; Garrard v. Hardey, 5 Man. & G. 471; Harrison v. Heathorn, 6 Man. & G. 81, 140; In re Mexican & South American Co., 27 Beav. 474, 481, 4 DeG. & J. 320; 1 Lind. Part. (3d ed.) 200-202.

61—*Bubble Act not Applicable to America.*

We attach equally little weight to the argument that the Bubble Act (St. 6 Geo. I c. 18) was made applicable to America, in 1741, by the St. of 14 Geo. II. c. 37, by which, among other things, all offenders against these acts were subjected to the penalties of a praemunire, and brokers dealing in the shares therein referred to were made incapable of acting as brokers for the future.

The Constitution continued in force, until altered or repealed, the laws which had been adopted, used, and approved in the Province, Colony, or State, and usually practised on in the courts of law (Mass. Const. c. 6, art. 6), and it may be true that "some few English statutes, passed since the emigration, were adopted by our courts."[8] But the fact that, as far back as the records of our judicial decisions extend, this act has not been practised on in the courts, but has been ignored by them, is strong evidence that the act was not among those that were kept in force after the Revolution.[9] In view of the practice and opinion disclosed in these cases, it is not necessary to give more than a word to the absurdity of attempting to enforce the act as a whole, or to the fact that the whole course of our legislation shows the same ignorance of its existence as the decisions, and that the St. of 1878, c. 275, clearly assumes such associations to be lawful.

[8] Commonwealth v. Knowlton, 2 Mass. 529, 534.

[9] Alvord v. Smith, 5 Pick. 232; Tappan v. Bailey, 4 Met. 529, 535; Tyrrell v. Washburn, 6 Allen 466, 475; Hoadley v. County Commissioners, 105 Mass. 519, 526; Bodwell v. Eastman, 106 Mass. 525; Taft v. Ward, 106 Mass. 518, 111 Mass. 518; Gott v. Dinsmore, 111 Mass. 45; Boston & Albany Railroad v. Pearson, 128 Mass. 445; Gleason v. McKay, 134 Mass. 419; Frost v. Walker, 60 Maine 468, 471.

62—*Beneficial Interest Passes to Legal Representative at Death.*

It is admitted that the partnership was formed under a declaration of trust, by which it was provided, among other things, as follows: 'The decease of a member of the association shall not work a dissolution of it, nor shall it entitle his legal representatives to an account, or to take any action in the courts or otherwise against the association or the trustee, for such; but they shall simply succeed to the right of the deceased to the certificate and the shares it represents, subject to this declaration of trust.'

The main question is whether this provision is broad enough to make the estate of a shareholder liable to contribute to the other partners for debts incurred after his decease, and before the executor has done any act by which he becomes a partner in the testator's place. In the opinion of the majority of the court, the provision has that effect. It may be conceded that without some act on his part, the executor would not become a partner; and, for the purposes of this case, it may also be conceded that the estate in the executor's hands would not be liable to creditors for such a debt, unless the executor was personally bound. There might be some difficulty in showing how such a new contract could be made with a dead man, and it might be said that our law does not recognize an estate as a universitas able to contract, or know any way of binding an executor otherwise than personally by a contract made after the testator's death.[10]

But a man may contract with his copartners to indemnify them for a certain proportion of liabilities incurred after his death; and, if such liabilities are incurred, his executor will be

[10] Labouchere v. Tupper, 11 Moore P. C. 198; Owen v. Delamere, L. R. 15 Eq. 134.

bound de bonis testatoris in the same way that he is by any other contract of his testator, and without introducing any analogous principle whatever.[11]

Ordinarily, when a partner contracts that his share in the profits shall continue to a certain time, he contracts by implication that his liability for losses shall have the same duration. We see no reason why this principle should not apply when the time extends beyond the partner's life. And when, as here, a company is purposely made as nearly a corporation as possible, and it is obviously intended that the death of a shareholder shall not affect either the company or the rights incident to the share, we think that the liabilities go with the rights, and that the effect of the testator's contract was that he would share losses until his estate was relieved of his shares in the stock.[12]

When a partner merely reserves an option to his executor to take his place in the firm, and perhaps even when he covenants that his executor shall take his place, but does no more, the interest of his estate in the profits after his death and therefore its liability for losses are dependent upon the executor's personal participation in the business; so that, if the executor declines, the firm will be dissolved by the death, and an account must be taken, although the surviving partner may be entitled to damages.[13]

63—*Profits and Losses Follow Certificates.*

But the present contrivance goes farther, and, as we have said, is intended to imitate a corporation so far as to stipulate

[11] Turquend v. Kirby, L. R. 4 Eq. 123, 134. See Hammond v. Grander, 128 Mass. 272; Bacon v. Pomeroy, 104 Mass. 577, 582.

[12] In re Agriculturist Cattle Ins. Co., L. R. 5 Ch. 725.

[13] See Downs v. Collins, 6 Hare 418.

that profits and losses shall follow the certificate, and that the certificate shall remain part of the estate of the deceased, whether the executor makes himself a member of the company or not. 'It is very true that an executor cannot become an actual partner in the concern, or be entitled under any new contract to the benefit of it, unless he has accepted the shares and agreed to become a partner, but the shares are vested in him and in some sense he is a shareholder, although not in the complete sense so as to be liable in his own person to all the subsequent responsibility.'[14]

The plaintiff's cause of action, in respect of the debt of the Grate Association to the Taunton Iron Works Company, accrued upon payment.[15] We do not gather that the plaintiff had either the duty or the right to pay this debt until he was sued, and see no ground for the defendant's plea that it is barred. On the other hand, the claim based upon the debt of the association to the plaintiff's firm is without foundation. The debt was not paid by being charged off to profit and loss on the books of the firm, even if, as between the plaintiff and his partner, it was converted into separate assets and divided. There is no need, therefore, to consider further objections.

Inasmuch as the plaintiff must recover, if at all, by virtue of the partnership contract to bear losses, and not by way of subrogation to the debt which he has paid, the bill cannot be maintained, as it now stands, for contribution in respect of a single item. But, in the present state of affairs, the defect seems to be purely formal, and the plaintiff may apply to a single justice for leave to make any amendment he may desire on such terms as seem proper; otherwise, the bill must be dismissed.

[14] Wills v. Murray, 4 Exch. 843, 868. See also Fyler v. Fyler, 2 Railw. Cas. 813.

[15] Hayward v. Hapgood, 4 Gray 437; Thayer v. Daniels, 110 Mass. 345.

64—*Transferability.*

A trust certificate is merely evidence of the number of shares or beneficial interest one may have in a trust; it is but a muniment of title—documentary evidence of ownership—not the beneficial interest or share itself.[16] One of the main incidents to property is its transferability; the power of disposing of shares—like the power of disposing of any other property—is a common right and necessarily attaches to ownership. In the light of established business methods and the law applicable thereto, it is clearly the duty of trusts and corporations, when required so to do, to make due and legal transfer of all their shares and stock sold and assigned.[17] The right to a transfer of a certificate of a trust can be enforced by a purchaser who has taken an assignment of it in a duly formal manner, although he has been hostile to the trust and is carrying on a rival business; where trustees are given no discretion to discriminate as to the transfers of such certificates, it is then the duty of the trustees, when certificates properly assigned be presented, to transfer the said beneficial interest on the books of the company and to issue a new certificate in lieu of the one so transferred.[18]

65—*Sale of—In Reference to Security Act.*

Trust certificates or shares in states in which there is no security act, may be sold and dealt in as a matter of right; but in states in which there is a security act, no general rule can be laid down. The act in force in Illinois up to June 11, 1921,

[16] Malley v. Bowditch, 259 Fed. 809, 7 A. L. R. 608.
[17] 7 R. C. L. 261.
[18] Rice v. Rockefeller, 134 N. Y. 174, 31 N. E. 900, 17 L. R. A. 237, 30 Am. St. Rep. 658; Alvord v. Smith, 5 Pick. (Mass.) 232.

reads in part as follows: "The word 'issuer' shall include every person and every company, trust, partnership or association incorporated or unincorporated heretofore or hereafter formed for any lawful purpose and organized under the laws of this state, or any foreign state or country."

It would seem that the words 'organized under the laws of this state' restrict the act to an organization deriving its powers from statutory enactment. In two cases before the United States Supreme Court to determine whether trusts (one of which was known as a department store trust, the other a real estate trust engaged in buying, improving, holding and selling buildings in Boston) were subjected to a tax under an act providing taxation for organizations under the laws of Massachusetts, the court said[19] in construing the phrase: "the pertinent question in this connection is: are these trusts organized under the laws of the state; the language of the act—now or hereafter organized under the laws of the United States, etc.—imparts an organization deriving power from statutory enactment. A trust of the character of those here involved can hardly be said to be organized within the ordinary meaning of that term."

The legislature of Illinois cured the defect in its security act by an amendment striking out the words 'organized under the laws of this state, or any foreign state or territory.' It appears that this state, in striking out the words of limitation, i. e. the words limiting the act to organizations under the laws of its state, brought the trust under the Security Act.

[19] Eliot v. Freeman, 220 U. S. 424. 178, 31 Sup. Ct. 360, 55 L. Ed.

CHAPTER VI.

INTERSTATE COMMERCE.

66—In General.

One of the principal advantages of the trust as a business organization over a corporation is that it is not restricted by state lines; it may do business in any state or territory without regard to any foreign corporation act. The corporation is a creature of the state; it comes into existence, not as a matter of right, but as the result of a charter by the state granting certain privileges to it. Being an artificial person it has no rights beyond the limits of its state only in so far as other states permit it to carry on business within their borders. There are certain rules and regulations which a corporation must follow in carrying its business into foreign states which, together with the foreign corporation acts, are a tax and an overhead charge on an expanding business. If this overhead were an initial or fixed charge, concerns doing a general business throughout the country would find little objection to it. However, it is a well known fact that most of the legislatures in recent years permit scarcely a session to go by without making some change in their law relative to foreign corporations; these changes mean increasing tax and overhead. Business has been not only hampered and restricted by the tax and expense, but in addition has been subjected to much litigation under the foreign corporation acts. There are numerous decisions in every state determining all sorts of questions under these acts; this is costly and also an annoyance which business should not be made to suffer. Should a corporation do business in every

state the mounting expense of keeping up with the changes in the laws may well be imagined. Should it, for any reason, fail to keep up with these changes and amendments, it is subject to fines and penalties. Business organized as a trust obviates all this expense, annoyance and difficulty.

67—*Trust Not Subject to Foreign Corporation Acts.*

One of the best examples we have of a general business being conducted throughout the states and remaining free from the burden of the various corporation acts is the express companies. In this chapter the Adams Express Company and the United States Express Company will be discussed in reference to interstate business; and under the paragraph on Taxes a decision is reported relative to the National Express Company. These companies were not corporations; they were associations with trust powers, and the evident reason for this form of organization was that they might carry on their business—necessarily interstate—without being subject to the various foreign corporation acts. These cases are interesting from that angle, but they illustrate only in a measure what business may do if organized under a pure trust wherein the title to all property is in the trustees who are free from the will of the beneficiaries.

The case of Kentucky v. The Adams Express Company[80] is worthy of attention, because of the magnitude of the business conducted by an unincorporated company, and the rules of law giving such organization the right to do business in other states without complying with the foreign corporation act. The Adams Express Company, in doing business in the state of Kentucky, was indicted for its failure to comply with the for-

[80] Commonwealth v. Adams Express Co., 123 Ky. 720, 97 S. W. 386.

eign corporation act. The company was called a joint-stock association, and in some jurisdictions companies of this character are subject to foreign corporation acts. The indictment was quashed and the Supreme Court sustained this action in holding that the Express Company was not a corporation and therefore not subject to the foreign corporation act of Kentucky. There might have been some doubt as to a joint-stock company coming under a foreign corporation act, but if the Express Company had been organized as a pure trust, in all probability it would not have been indicted, for it is shown conclusively that a trust may do business in the states as a matter of right under the constitution of the United States. The decision is substantially as follows:

Hobson, C. J. The Adams Express Company is a joint-stock association created under the laws of the state of New York. It is composed of about 3,000 members, all of whom are nonresidents of this state. The associations are in legal effect partnerships, although they are treated as quasi corporations for the purpose of serving process upon them. In Adams Express Company v. Schofield,[21] it was held that a summons served upon an agent under subsection 4 of section 51 of the Civil Code of Practice was sufficient service upon the express company on the ground that it would be otherwise impossible to bring an association of 3,000 members before the court.

In the case now before us the Adams Express Company has been indicted for doing business in this state without having filed with the secretary of state the statement required by section 571, Ky. St. 1903. That section is in these words: "All corporations except foreign insurance companies formed under the laws of this or any other state, and carrying on any

[21] 111 Ky. 833, 64 S. W. 903.

business in this state, shall at all times have one or more known places of business in this state and an authorized agent or agents thereat upon whom process can be served; and it shall not be lawful for any corporation to carry on any business in this state, until it shall have filed in the office of the Secretary of State a statement, signed by its president or secretary, giving the location of its office or offices in this state, and the name or names of its agent or agents thereat upon whom process can be served; and it shall not be lawful for any corporation to carry on any business in this state, until it shall have filed in the office of the Secretary of State a statement, signed by its president or secretary, giving the location of its office or offices in this state and the name or names of its agent or agents thereat upon whom process can be served; and when any change is made in the location of its office or offices or in its agents, it shall at once file with the Secretary of State a statement of such change for the purpose of service until statement of appointment of new agent is filed; and if any corporation fails to comply with the requirements of this section, such corporation, and any agent or employe of such corporation, who shall transact, carry on or conduct any business in this state for it, shall be severally guilty of a misdemeanor, and fined not less than one hundred nor more than one thousand dollars for each offense."

68—*Unincorporated Is Not Embraced in Word Corporation.*

The only question we deem it necessary to consider is whether the express company is a corporation within the meaning of this section. Section 208 of the Constitution provides: "The word corporation as used in this Constitution shall embrace joint stock companies and associations." But as the question before us does not turn on the meaning to be given any provision of the Constitution, this section is not conclusive of

the question before us. Section 457, Ky. St. 1903, being a part of the act for the construction of statutes, is in these words: "A word importing the singular number only may extend and be applied to several persons or things, as well as to one person or thing, and a word importing the plural number only may extend and be applied to one person or thing as well as to several persons or things. A word importing the masculine gender only may extend and be applied to females as well as males; and the word 'person' may extend and be applied to bodies politic and corporate societies, communities, and the public generally, as well as individuals, partnerships, persons and joint-stock companies. The words 'corporation,' 'company,' may be construed as including any corporation, company, person, persons, partnership, joint-stock company or association."

It is manifest that a word importing the singular number will not always be applied to several persons or things; that a word importing the masculine gender will not always be applied to females. So, the word "corporation" will not always be construed to include a partnership or joint-stock association. "As to what meaning the word 'corporation' is to receive in any provision of statute, of course, the context must in some measure determine. It will not embrace partnerships, when not so intended by the legislature."[21½] Bearing this rule in mind, what meanings are we to give the word "corporation" in section 571 above quoted? The section is a part of an act approved April 5, 1893, entitled, "An act providing for the creation and regulation of private corporations." The first section of the act Laws 1893, p. 612, c. 171 (see Ky. St. 1903, Sec. 538) provides for what purposes such corporations may be formed. The next section (section 539) provides what the articles of incorporation shall specify. Neither of these sec-

[21½] Adams Express Co. v. Schofield, Supra.

tions can have an application to partnerships or unincorporated companies. The same is true of the immediately following sections of that article; section 571 comes in the same article. We have been unable to see any provision from the beginning of the article down to section 571 which would indicate that the legislature had in mind, or was attempting to regulate, unincorporated companies. To illustrate: neither sections 567, 568, 569 nor 570 on their face could be applied to unincorporated companies. Nor could section 573, which follows it; nor 576. An unincorporated company could not truthfully print upon its advertising matter the word "incorporated" (section 576). An unincorporated company might, as the law then stood, engage in the banking business, and it might own real estate not necessary for the carrying on of its business for a longer period than five years (section 567). It might issue stock or bonds without an equivalent in money or property actually received (section 568); it could not be proceeded against by the Attorney General (section 569). It was not required to accept any provisions of the Constitution, and could have no charter containing powers, privileges, or immunities inconsistent with the provisions of the act (section 570). These sections immediately precede section 571, and in the sections following it to the end of the article there is nothing to indicate that the legislature had in mind, in enacting them, unincorporated companies. We, therefore, conclude that, reading section 571 with the other provisions of the act immediately preceding and following it and in view of the title of the act and its manifest purpose, the word "corporations" in section 571 only includes incorporated companies, and does not include unincorporated associations such as joint-stock companies.

There is no distinction in the construction of statutes between criminal and civil enactments, but all statutes must be construed

with a view to carry out the intention of the legislature. Ky. St. 1903, Sec. 459. But laws which create crime should be sufficiently explicit that men subject to their penalties may know what acts are forbidden, and before a man can be punished, his case must be plainly within the statute.[22] Crime is not to arise upon doubtful construction of a statute where a person of ordinary intelligence, reading the statute, would not understand from it that the act was forbidden. Criminal statutes are not cunningly and darkly framed to catch the unwary, and they are not extended for this purpose beyond the fair and natural meaning of the words used. The statute in question has been in force for a number of years, and in no case, so far as we are aware, until the present, has it been sought to be applied to unincorporated companies. Section 194 of the Constitution is as follows: "All corporations formed under the laws of this state, or carrying on business in this state, shall, at all times, have one or more known places of business in this state, and an authorized agent or agents there upon whom process may be executed, and the General Assembly shall enact laws to carry into effect the provisions of this section." The express company has complied with this provision. It has places of business in the state and authorized agents there upon whom process may be executed so that no provision of the Constitution has been violated. Section 571 of the statute was, perhaps, enacted to carry into effect the provisions of the Constitution as to private corporations; but nothing more, as shown above, was in the mind of the legislature in that enactment. Judgment affirmed.

The trial court held that the Adams Express Company was not a corporation, and for that reason it was not subject to the

[22] U. S. v. Lacher, 134 U. S. 628, 10 Sup. Ct. 625, 33 L. Ed. 1080.

foreign corporation act of Kentucky; the supreme court sustained this view. Under this rule, as a matter of course, the trust is not subject to the foreign corporation acts.

TRUST PROTECTED IN TRADE NAME.

69—*In General.*

The United States Express Company as such was doing business in Illinois with its principal office in Chicago. Other parties sought to secure a charter from the State of Illinois for the incorporation of another United States Express Company on the theory that the company then doing business was not incorporated; that it did not comply with the foreign corporation act of Illinois; that it was unlawful to conduct a business under the name of the United States Express Company in Illinois without complying with the laws of that state. The secretary of state refused to issue a charter to the parties seeking to usurp the name of the United States Express Company. The court, in passing on the question, maintained that inasmuch as the Express Company had an established business it would, in substance, be a fraud on the public to permit people other than those then conducting the business under the name of United States Express Company to use that name.[23]

The parties seeking to incorporate filed a petition for mandamus to compel the secretary of state, James A. Rose, to issue a charter to them and alleged in substance that: Patrick L. Touhy, William H. Peacock and F. T. Donovan, acting as commissioners under the corporation act of Illinois and the amendments thereto, filed in the office of the secretary of state

[23] This case is known in the reports as The People v. Rose, 219 Ill. 46, 76 N. E. 42.

at Springfield a statement or application for a license to open books of subscription to the capital stock of a company to be known as or named "United States Express Company," with a capital stock of $2500. to be divided into twenty-five shares of $100. each; that the object for which the company was to be formed was to receive, carry and transport for hire packages large or small and to do a general express business, the life of the company to be ninety-nine years with its principal office in Chicago; that the said statement or application was duly signed and acknowledged according to law by the commissioners, and the fee of $30. as required by law was on said day paid to the secretary of state, who did on February 23, 1905, issue a license to said commissioners, authorizing them to open books of subscription to the capital stock of the United States Express Company, which said license was signed by the secretary of state and sealed with the great seal of State, copy being attached to the petition; that the commissioners opened books of subscription for the capital stock of the United States Express Company, and the stock was all subscribed for, to wit: Patrick L. Touhy, one share $100.; F. R. Power, twenty-three shares $2300.00; F. G. Crary, one share $100.; that thereafter the commissioners on March 6, 1905, at Chicago, at two o'clock P. M., convened a meeting of the subscribers of stock pursuant to notice required by law, for the purpose of electing a board of directors, etc., which notice was deposited in the post-office, properly addressed to each subscriber ten days before the time fixed for the meeting; that the subscribers met at the time and place specified in the notice and proceeded to elect directors, and that the following persons were duly elected for the term of one year: Patrick L. Touhy, F. R. Power, and F. A. Andrews; and that the post-office address of said company was at 171 Washington Street, Chicago; that thereupon the com-

missioners made a report of their acts and doings as such to the secretary of state, stating therein that they opened books of subscription; that the stock was fully subscribed, and giving a copy of said subscription, and that pursuant to notice, copy of which was set forth, the subscribers to the stock met and elected directors as above stated, and also that the post-office address of said company was No. 171 Washington Street, Room 303, in Chicago, which said report was on March 6, 1905, sworn to before a notary public by said commissioners. The petition further stated that the report was mailed to the secretary of state, and by him received at his office in Springfield on or about March 9, 1905; that there was no company chartered under the laws of Illinois to do business in the name of United States Express Company, and that there was no foreign company or corporation licensed to do business in Illinois in the name of United States Express Company; that, when the Secretary of State received the report, being in all respects as by law required, it was his legal duty to file the same in his office and issue the final certificate of incorporation of the company; yet, that the said Rose, so being such secretary of state, wholly refused to file the report and to issue the final certificate of incorporation of said company as required by the statute; that the said Rose, as such secretary, returned said report to petitioners and refused to complete the final organization of said company by receiving and filing said report and issuing the final certificate of incorporation by means whereof the petitioners were denied the right of becoming a corporation under the name of "United States Express Company," to which they were justly and lawfully entitled. Petitioners, therefore, prayed a writ of mandamus, directed to said Rose, Secretary of State, commanding him forthwith to receive the report of the commissioners, and to file it and issue a certificate of the

complete organization of the corporation, and that such further order be entered in the premises as justice may require.

The secretary of state in answering the petition alleged that the court was without jurisdiction to hear and determine the matters set out in the petition; that respondent did not deny any of the allegations of fact in the petition except that he had no knowledge, and, therefore, neither admitted nor denied the allegations respecting the opening of books for subscription to the capital stock aforesaid, or whether the stock was fully subscribed, or whether a meeting of the subscribers was convened and held according to law, or whether a board of directors was elected as alleged. The answer denied that it was the legal duty of respondent to issue a final certificate of incorporation to said United States Express Company; and further denied that said petitioners, or any of them, had a right to incorporate under the laws of Illinois under the name of "United States Express Company." The answer further stated that, when the license was issued out of respondent's office, it was done by one of his clerks who supposed at the time that the parties, desiring to incorporate under the said name, were the same persons interested in the company hereinafter mentioned known as "The United States Express Company," and that no question was made at the time concerning the issuing of said license; that subsequently thereto respondent was informed that the parties to whom the license had been issued were in nowise interested in the United States Express Company hereinafter mentioned; "that there is now in existence a joint-stock company, called 'United States Express Company,' organized and doing business under the common law and statute law of the State of New York, and that the United States Express Company here referred to will hereinafter be mentioned as the old United States Express Company;" that "said old United States Ex-

press Company was organized as a joint-stock association or joint-stock company on the 22nd day of April, 1854, in the State of New York, and that said old United States Express Company thereupon entered upon the transaction of a general express business throughout the United States, and has been ever since engaged in said business, and is now engaged in the same in every State and territory of the United States as well as in the dominion of Canada and in foreign countries; that the said old United States Express Company carries on its business upon various railroads and steamship lines throughout the United States and Canada and also in foreign countries; and that its business in a general way consists of the transporting and delivering of large and small packages of freight, merchandise, valuable documents, papers and moneys, and that it has been engaged in said business continuously ever since the time of its organization as aforesaid; that its name is placed upon express cars on various railroads in the United States and upon its wagons used to transport the merchandise, papers and moneys above referred to; and that said old United States Express Company is possessed of and operating many hundreds of wagons by means of thousands of horses owned by it; and that the name 'United States Express Company' is well known throughout all of the United States and foreign countries as a company engaged in the transportation and delivery of merchandise, valuable packages, and money, for hire."

The answer further said that, subsequent to the issuance of said license and prior to the time of his receiving the report of the commissioners, he was informed and believed it to be true that the use by any persons of said name, whether associated as incorporators or as co-partners or as individuals, would be a fraud upon the old United States Express Company.

70—*Business Name Protected by Injunction.*

The answer further said that the petitioners were not, prior to the filing of the said bill, nor was any of them engaged in the express business; that the incorporation of said persons under the name "United States Express Company" was a new venture, and so far as the objects of said incorporation relative to the doing of an express business were concerned, it was a matter concerning the future and it was not intended that said corporation take over or continue any existing express business; that respondent believed that the petitioners had no right to become incorporated under the laws of Illinois as the United States Express Company and for these reasons he refused to issue a final certificate of incorporation to the said persons as "United States Express Company."

The petitioners filed a general and special demurrer to this answer and the court, in passing on the issues raised, said: "By the demurrer to the answer, the allegations of fact in the answer are admitted to be true. Under these allegations, as set forth in the statement preceding this opinion, the company referred to in the answer as the 'old United States Express Company,' would have the right and power to restrain by injunction the use of its name by petitioners herein, or by the new corporation which they propose to form. In International Com. Y. W. C. A. v. Y. W. C. A.[94] we held that, although generic terms or mere descriptive words are the common property of the public and not ordinarily susceptible of appropriation by an individual, yet an injunction may issue to restrain the use of such terms, or words, at the suit of one who has already adopted them, where the evidence shows a fraudulent

[94] 194 Ill. 194, 62 N. E. 551.

design and that the public will be misled. In cases referred to and quoted from in the Y. W. C. A. case, supra, it was held that, although certain plaintiffs had no exclusive right to the words 'Conveyance Company,' or 'London Conveyance Company,' or any other words, they had a right to call upon a court of chancery to restrain the defendant from fraudulently using precisely the same words and devices which they had taken for the purpose of distinguishing their property, and thereby depriving them of the fair profits of their business by attracting custom on false representation; that carriages, really belonging to the defendant, belonged and were under the management of the plaintiff. It was there held that, although there was no property in the words 'The Guinea Coal Company,' yet it was a fraud on a person who had an established trade and carried it on under a given name, that some other person should assume the same name with a slight alteration, as 'The Pall Mall Guinea Coal Company,' in such a way as to induce persons to deal with him in the belief that they were dealing with the person who had given a reputation to the name; in other words "that it is a fraud on the part of a defendant to set up business under such a designation as is calculated to lead, and does lead, other people to suppose that his business is the business of another person."

In McLean v. Fleming,[25] it is said: 'Nor is it necessary, in order to give a right to an injunction, that a specific trademark should be infringed, but it is sufficient that the court is satisfied that there was an intent on the part of the respondent to palm off his goods as the goods of the complainant.' The same doctrine is announced in other cases.[26]

[25] 96 U. S. 245.

[26] Lane v. Brothers, etc., 120 Ga. 355; Aiello v. Montecalfe, 21 R. I. 496; Rudolph v. Southern Beneficial League, 23 Abbott's N. C. 199.

In the case at bar, the old United States Express Company had had an established business in the United States, and in foreign countries, for more than fifty years, when the petitioners made application to the Secretary of State to organize a corporation in Illinois under the same name, to-wit, the 'United States Express Company.' It appears from the allegations in the answer that the incorporation of the new company under the same name as the old company, would be a fraud upon the old company as being an attempt to take away from it a part of its business, and to deceive the public into the belief that, when dealing with the new company, they were, as matter of fact, dealing with the old company. Indeed, the answer specifically alleges that the action proposed to be taken by the commissioners, would be a fraud upon the old company, and the demurrer to the answer admits this allegation.

It being true, then, that the old company would be entitled to file a bill in chancery to enjoin the new corporation proposed to be organized from doing business under the same name as the old company, the writ of mandamus will not issue to compel the secretary of state to issue a certificate of organization to the new company. The writ of mandamus will not be issued, if its issuance would fail to accomplish a good purpose, or to have a beneficial effect. "The writ is not granted as a matter of absolute right, and where it can be seen that it cannot accomplish any good purpose, or that it will fail to have a beneficial effect, it will be denied."[27] It is difficult to see how the issuance of the writ in this case could accomplish any good purpose, or have any beneficial effect, if the new corporation, proposed to be organized, could be enjoined from using the name of the old company, and doing business under that name.

[27] Cristman v. Peck, 90 Ill. 150; People v. Lieb, 85 Ill. 484; Illinois Watch Case Co. v. Pearson, 140 Ill. 423.

71—Joint-Stock Companies and Partnerships Distinguished from Corporations.

It is contended, on the part of the petitioners, that the old United States Express Company is a foreign corporation, organized under the laws of New York, and that, as such foreign corporation, it cannot be admitted to do business in Illinois except by comity of the latter State. It is furthermore insisted that the old United States Express Company cannot do business in this State, or maintain any suit in the courts of this State, because it has not obtained a license so to do business in Illinois from the secretary of state of Illinois. Many decisions are referred to by counsel in support of this position. The argument proceeds upon the supposition that the old United States Express Company is a foreign corporation. It does not appear, however, clearly, upon this record, that it is a foreign corporation.

The answer avers 'that there is now in existence a joint-stock company called United States Express Company, organized and doing business under the common law and statute law of the State of New York.' The demurrer to the answer admits this allegation to be true. For the purposes of this case, therefore, the old United States Express Company is to be regarded as a joint stock company organized and doing business under the common law, as well as the statute law of the State of New York. A joint-stock company is defined in the text books to be 'an association of individuals for purposes of profit, possessing a common capital which is divided into shares of which each member possesses one or more, and which are transferable by the owner. These associations, formed for business purposes, were at common law, and, as a general rule, still are considered merely as partnerships, and their rights and

liabilities are in the main governed by the same rules and principles which regulate commercial partnerships.'[28] While it is true that many companies called joint-stock companies have many of the essential characteristics of a corporation, yet there is a distinction between such companies and regularly organized corporations, so-called. In 17 Am. & Eng. Ency. of Law, 2d ed., p. 638, it is said: "In respect to their formation there is a broad distinction between a corporation, technically so called, which always owes its existence to the sovereign power of the State, and a joint-stock company which being essentially a partnership is brought into being by the contract of its members inter sese." Counsel refer to cases in other states and in the Federal courts, holding that joint-stock companies possess many of the characteristics of corporations, but the definition which characterizes them as partnerships has been recognized as correct, if not actually adopted, by the decisions of the Illinois courts.

In Robbins v. Butler,[29] this court, speaking through Mr. Justice Breese, said: "These stock companies are nothing more than partnerships, and every member of the company is liable for the debts of the concern, no matter what the private arrangements among themselves may be, if they have not shifted their liability in the very mode pointed out in the articles of association."[30] In Wadsworth v. Duncan,[31] this court, speaking through Mr. Justice Phillips, again said, endorsing the doctrine announced in Robbins v. Butler, supra, as follows: "The members of a joint-stock association are partners, and each member is liable for the debts of the association unless he has

[28] 17 Am. & Eng. Ency. of Law 2d ed., pp. 636, 637.
[29] 24 Ill. 387.
[30] Pettis v. Atkins, 60 Ill. 454; Hodgson v. Baldwin, 65 Ill. 532.
[31] 164 Ill. 360, 45 N. E. 132.

shifted his liability in the very mode pointed out in the articles of association."

72—Foreign Corporation Acts not Applicable to Organizations Created by Contract.

In view of what has been said, it is not altogether certain that the old express company, which is admitted here to be a joint-stock company, is such a foreign corporation as is required by our statute to file a copy of its charter or articles of incorporation or certificate of incorporation, in the office of the secretary of state. The statute, imposing the requirement in question upon a foreign corporation desiring to do business in this State, speaks of "every company incorporated for the purposes of gain under the laws of any other state," etc., and, in the subsequent part of the section which uses the words just quoted, the company, so incorporated, is referred to as "such corporation," and not as "such company"; and it would seem to be the proper construction of the statute in question, (4 Starr & Cur. Ann. Stat.—sup. ed., p. 310) that it refers to regularly organized corporations, rather than to joint-stock companies. This is so because, as has already been stated, the corporation, technically socalled, owes its existence to the sovereign power of the State, while the joint-stock company, being merely a partnership, is brought into being by contract of its members. The statutory requirement embraces foreign corporations rather than joint-stock companies, because the former owe their existence to the power of a foreign State; and statutes in relation to requirements, imposed upon foreign corporations, concern the creatures of the foreign states and not the creatures which are brought into being by the mere contract of parties. In the case at bar, the provisions of the instrument or articles

of organization under which the old United States Express Company acts and does business, are not anywhere set forth in the present record. We are unable to say what the terms of its articles of association are as they are not set forth in the pleadings. But whether the view thus taken of the character of the old United States Express Company is correct or not, it is certainly a matter of doubt whether it is a corporation or a mere partnership. Under these circumstances the writ of mandamus will not be issued. "The writ is never granted in doubtful cases, nor unless the party asking it has a clear right."[38]

73—Trusts May Use Trade Name for Legitimate Purposes.

It is furthermore contended by the petitioners herein that, if the old United States Express Company is not a corporation, then it had no right to use the name "United States Express Company" in the transaction of business in the State of Illinois. This contention is based upon the alleged ground that the Criminal Code of this State makes it an offense to assume and use a corporate name in transacting business, not being incorporated. The provision of the Criminal Code thus referred to reads in part as follows: "If any company, association or person puts forth any sign or advertisement and therein assumes, for the purpose of soliciting business, a corporate name, not being incorporated, such company, association or person shall be fined not less than $10.00, nor more than $200.00, and a like sum for each day he or it shall continue to offend after having been once fined." (1 Starr & Curt. Ann. Stat. 2d. ed. p. 1332, sec. 368.)

[38] High on Ex. Legal Rem., sec. 9; Illinois Watch Case Co. v. Pearson, Supra.

The section of the Criminal Code above quoted was passed in March, 1869, either in the above or a more stringent form. The answer shows that the old United States Express Company was organized in 1854, fifteen years before this statute was passed, and had been doing business throughout the country for many years before its passage. During the years prior to its passage when it was thus transacting business, it cannot be said that it was not doing business in good faith, or that it was doing business with any intention of violating the law in question, because the law in question was not then in existence. It is to be observed, however, that the statute does not denounce the assuming of a corporate name, but the putting forth of a sign or advertisement, and thereby assuming a corporate name for the purpose of soliciting business. It cannot be said here that the old company in question put forth its corporate name for any such purpose. "What the legislature had in view in enacting this section of the Criminal Code manifestly was to prevent persons from obtaining a fictitious credit by advertising themselves as being a corporation when they were not incorporated."[88] Under the allegations of the answer herein, which are admitted to be true by the demurrer, it cannot be said that the old company here under consideration was in any way advertising itself as a corporation for the purpose of obtaining a fictitious credit. Before the criminal statute was passed, it already had a credit which was not fictitious, so far as the present record shows. The fraud, which the criminal statute in question seeks to punish or to prevent, is the use of a name in such a way as to deceive the public, and it is the deception or improper use of the name, and not the name itself, which constitutes such fraud. "It is not, therefore, enough to

[88] Edgerton v. Preston, 15 Ill. App. 23.

show the mere use of the name to make out a violation of the statute; there must be some evidence at least, tending to show such use as the statute forbids."[84]

It is furthermore to be observed that this criminal statute does not make contracts made by persons guilty of the offense prohibited, invalid, but merely provides that such persons shall be liable to pay a certain fine. It would appear, therefore, that a violation of the statute can be attended with no other consequences than merely the infliction of the penalty therein prescribed.[84a]

For the reasons above stated, we are of the opinion that the Secretary of State properly refused to issue a certificate of complete organization of the new corporation proposed to be organized by the petitioners, and that the prayer of the petition herein for a mandamus must be and is denied."

In this case the court not only recognizes the right of an organization created by contract among its members to exist—as distinguished from a corporation which owes its existence to the sovereign power of the state, but also protects it in its established business. The trust belongs to that group of organizations which is brought into being by contract with its members.

74—Right of Trust to do Interstate Business.

Trustees have the same rights and privileges as individuals and as such may do business in any state in the union under protection of the Federal Constitution. The state of Indiana sought to prohibit non-residents as such from being trustees in property in that state. The statute involved reads as follows: "It shall be unlawful for any person, association, or

[84] Imperial Manf. Co. v. Schwartz, 105 Ill. App. 525.

[84a] Edgerton v. Preston, Supra.

corporation to nominate or appoint any person a trustee in any deed, mortgage, or other instrument in writing, (except wills) for any purpose whatever, who shall not be at the time a bona fide resident of the state of Indiana; and it shall be unlawful for any person who is not a bona fide resident of the state to act as such trustee. And if any person, after his appointment as such trustee, shall remove from the state, then his rights, powers, and duties as such trustee shall cease, and the proper court shall appoint his successor, pursuant to the act to which this is supplemental."

The Federal Court, in passing on this statute, reads into its decision Section 2 of Article 4 of the Constitution of the United States, which declares that "the citizens of each state shall be entitled to all the privileges and immunities of citizens in the several states" and the court then said: "A citizen of the United States cannot be denied the right to take and hold absolutely real or personal property in any state of the Union, nor can he be denied the right to accept the conveyance of such property in trust for his sole benefit, or for the benefit of himself and others. This right is incident to national citizenship."[35]

This same rule of law that the trust, through its trustees, is a citizen of the United States, that as such it may do business in any section of the country, is followed and emphasized by a later case[36] in the federal court, which is hereafter reported in substance.

Action by Elbert W. Shirk, trustee, against the city of LaFayette; on motion to dismiss the complaint for want of jurisdiction; overruled. Baker, District Judge; action by the

[35] Farmers Loan & Trust Co. v. C. & A. Ry. Co., 27 Fed. 146.

[36] Shirk v. City of LaFayette, 52 Fed. 857.

plaintiff as trustee against the defendant to recover damages for the diversion and use of water. The complaint in substance alleged that the plaintiff was a citizen of the state of Illinois, and that the defendant was a citizen of the state of Indiana. It further alleged that the plaintiff was a duly appointed trustee of property situated in the state by the circuit court of Miami County, Indiana. The defendant, City of LaFayette, moved to dismiss for want of jurisdiction on the ground that the plaintiff, though actually residing in Illinois was to be deemed a citizen of Indiana, because he was appointed trustee by an Indiana court, and sued in his trust capacity for damage to trust property situated in that state. Assuming, without deciding, that the jurisdiction of the court may be challenged by motion, as well as by plea or answer,[37] the court disposed of the question of jurisdiction on its merits. Section 2988, Rev. St. Ind., which provides that "it shall be unlawful for any person, association or corporation to nominate or appoint any person a trustee in any deed, mortgage, or other instrument in writing, except wills, for any purpose whatever, who shall not be at the time a bona fide resident of the state to act as such trustee" is in conflict with the Constitution of the United States, Article 4, Section 2 which declares that the citizens of each state shall be entitled to all the privileges and immunities of citizens on the several states.[38]

The statute of Indiana, which sought to make it unlawful for a citizen of another state to act as trustee in that state, being unconstitutional and void, the question of jurisdiction had to be settled by determining whether the citizenship of the plaintiff

[37] McDonald v. Flour-Mills Co., 31 Fed. 577; Sharon v. Hill, 23 Fed. 353.

[38] Bruant v. Richardson, 126 Ind. 145, 25 N. E. 807; Robey v. Smith, Ind. Sup. 30 N. E. 1093; Farmers' Loan & Trust Co. v. C. & A. Ry. Co., 27 Fed. 146.

for the purposes of jurisdiction was affected by the fact of his appointment as trustee by an Indiana court for property situated in the state. In Rice v. Houston,[39] it is held that one appointed administrator may become a citizen of another state, and after such change of citizenship he may sue in the federal court. In New Orleans v. Whitney,[40] the court says: "We have repeatedly held that representatives may stand upon their own citizenship in the federal courts irrespective of the citizenship of the persons whom they represent—such as executors, administrators, guardians, trustees, receivers," etc. To the same effect is the case of Harper v. Railroad Company;[41] text writers on Practice in the federal courts state the rule of law in the same way.[42] The motion was held groundless and was overruled. The court, in dismissing the motion of the City of LaFayette, unequivocally held that Shirk, a trustee residing in Illinois, could, as trustee, maintain action at law the same as any citizen under the constitution of the United States.

[39] 13 Wall. 66.

[40] 138 U. S. 595 (page 606), 11 Sup. Ct. Rep. 428 (page 431).

[41] 36 Fed. 102.

[42] Fost. Fed. Pr. Sec. 19 Story, Fed. Pr. Sec. 19.

CHAPTER VII.

BENEFICIARIES OR SHAREHOLDERS.

75—Who May Be.

It is an established rule of law that shareholders or beneficiaries are essential to the formation of a trust. It is not necessary to name them in the instrument, but they must be designated or described so they may be identified. The shareholders are the owners of the trust property and their individual rights and interests may be evidenced by certificates showing the exact amount each beneficiary is entitled to; there are no limitations as to who may be shareholders. Any shareholder having an interest in the trust or the trust property has a right to insist, in proper proceeding, that the trust shall be maintained and executed according to the terms of the trust.[43] At law the trustees are considered the owners of the trust property, yet in a court of equity the shareholders are the absolute owners, the trustees taking only sufficient title to discharge the trust.[44] When the relation of trustee and cestui que trust is once established, no subsequent dealing with the trust property by the trustee can alter the relation of the parties.[45]

76—Rights in General.

The word trustee signifies a fiduciary capacity; it is a representative term and indicates a relationship to others, namely—

[43] Hill v. Hill, Okla. 152 Pac. 1122.

[44] Ex Parte Jones, 186 Ala. 567, 64 South 960.

[45] Cox v. Cox, 95 Va. 173, 27 S. E. 834.

beneficiaries. The trustees are the masters of the trust property, but they are limited in their authority and action in the enforcement of the trust by the interests and welfare of the beneficiaries. While the shareholders cannot dominate the trustees as such, they are entitled to know at all times what is being done with the trust property; they have rights in the trust estate which may be enforced in a court of equity. One of the leading cases in which the shareholders called the trustees to account and enforced their rights is Bingham v. Graham.[46] In this case the beneficiaries were dissatisfied with the reports and action of the trustees, so they filed a bill setting forth their grievances and asked for a receiver, which was granted. The procedure and action was sustained by the Supreme Court of Texas; the case, as reported, is in the main, as follows:

Appellee Graham, joined by 79 other parties, some of them nonresidents of the state, as plaintiffs, filed their petition in the district court of Dallam county against G. E. Martin, W. A. Poole, J. L. Allred, and B. N. Richards, trustees of the Texline-Burk Oil Company, a joint-stock association, joining as defendants C. S. Bingham, E. L. McCullough, G. F. Ward, T. J. Fletcher, W. E. Dyche, and Dallam County Bank of Texline, a joint-stock association. They prayed for the appointment of a receiver, without notice, of all the property of the Texline-Burk Oil Company; that citation issue to each of the defendants; that upon a final hearing an accounting be had; that judgment be rendered in favor of plaintiffs for the use and benefit of themselves and other interested shareholders who might intervene for all sums of money misappropriated by the trustees of the association or other named defendants, requiring them to pay the same into court; for a judgment

[46] (Tex.), 220 S. W. 105.

against the defendants Bingham and Poole for any amount of profits illegally charged the association on the oil and gas lease referred to; that a judgment be rendered in favor of plaintiffs, or so many of them as purchased any of the illegal increased capital stock, and against the organizers, for the respective amounts paid for such stock; that the deed of trust lien be canceled; that the holder or holders of certain notes, if defendants, be required to cancel and surrender said notes; and for such other and further relief, in law and equity.

77—Wrongs to Beneficiaries May be Presented to the Court by Petition.

The petition alleged, in substance, that on or about the 19th day of October, 1918, C. S. Bingham, W. A. Poole, E. L. McCullough, J. L. Allred, G. E. Martin, G. F. Ward, and W. R. Dyche formed a joint-stock association, adopting the name of Texline-Burke Oil Company; that the board of trustees elected defendant Bingham as president, defendant McCullough as secretary, and defendant Poole as the treasurer, which offices they still hold; that plaintiffs are the holders of more than 200 shares in said joint-stock association, and as such sue for the use and benefit of themselves and such other shareholders as have bought and paid for their stock in the association; that thereafter, on and before the 1st day of January, 1919, the defendants (other than the defendants Richards and the Dallam County Bank) offered for sale and sold shares in the association at the par value of $50, 200 of said shares being purchased and paid for by plaintiff who sold certificates of stock issued by said officers; that as said shares were sold by the defendants they issued a written contract signed by said officers (other than the defendants Richards and

said bank), wherein and whereby they represented to all purchasers of stock that said association had a capital stock of $60,000; that it owned an oil and gas lease of 2½ acres out of the southeast corner of the 50-acre tract of the Du Bose survey, in the Burkburnett oil field, in Wichita county, Tex., and contracted and agreed to and with said purchasers of stock that the association would begin an oil well as soon as the capital stock was placed, said well to be drilled to what is known as the Fowler sand, unless oil or gas was found in paying quantities at a lesser depth, said well to be drilled, equipped and together with said lease to be delivered to the stockholders.

It was further alleged that, after selling and disposing of the capital stock and receiving the $60,000 therefor, the trustees failed and refused to carry out their duties as provided in the articles of association, and to drill or cause to be drilled a well of any kind on said 2½-acre tract; that, contrary to and in violation of the articles of the association, the defendants sought to increase the capital stock, and did about the month of February, 1919, increase the capital stock $7,000, and thereafter sold such increased capital stock, issuing certificates to the purchasers thereof in due form; that, if any attempt was made to increase the capital stock, it was without notice to or knowledge of the stockholders and in violation of the rules and regulations of the association, and such increase and issue of certificates was void, except that the money received by defendants for such increased capital stock created outstanding indebtedness against the association to that extent; that the trustees fraudulently misappropriated the funds of the association to the amount of $3,500 in acquiring from the defendants Bingham and Poole a lease on 1¼ acres of land in Wichita county, said lease being executed May 1, 1919, and that said misappropriation was in violation of section 1, art. 2, of the

articles of association, for which said trustees are personally liable to plaintiffs and other shareholders; that they also misappropriated a large sum of money of the association, in that they fraudulently caused a well to be drilled on said 1¼ acres of land, which well was completed during the month of April, 1919; that said well was drilled on said land with the funds of the association prior to the time the trustees had acquired any written lease of the property and while the title was in other persons than the trustees; that they acquired said land from Bingham and Poole, who were then officers of the association, through a conspiracy on the part of said Bingham and Poole and said trustees, paying them and other defendants who were interested in the lease a profit of at least $10,000, although Bingham and Poole did not have at any time any individual funds, but had purchased the land upon the credit of and with funds belonging to the association, and fraudulently acquired the title thereto in their individual names, and immediately thereafter transferred the same to the association.

78—Beneficiaries Entitled to Information from Trustees.

It was further alleged that, although repeated demands were made on the trustees and officers for a financial statement as to the condition of the association and of the receipts and disbursements made by the trustees and officers—said demands having been first made about May 1, 1919, and continued and repeated to the present time—they have failed and refused to furnish a financial statement or to inform plaintiffs or other stockholders as to receipts and disbursements, or to make any report as to the condition of the affairs of the association, showing its assets and liabilities, save and except that they prepared and mailed to the shareholders a printed letter about the

10th day of June, 1919, in which they stated that the first well had been completed; that it was not producing as much as they anticipated, but the pipe line receipts showed its production to be approximately 30 barrels of oil daily. Said letter further stated that they had a contract with the company to take the casing head gas which would yield some income and would have a tendency to increase the production of oil; that they were in communication with a contractor to drill one or more wells on the west 2½-acre lease and promised to keep the stockholders advised of any action taken by the trustees in that regard. It was further stated in the letter that the expenses were heavy, that there would be no dividends available for a few months, but that they were operating as economically as possible.

It was further alleged that on or about the 11th day of June, 1919, 56 of the shareholders presented to the defendants a written statement requesting the following information:

(1) A statement of the stock issued and paid for in said association.

(2) The net proceeds from the sale of said stock paid into the association.

(3) An itemized accounting of the expenditures of said association to the 1st day of June, 1919.

(4) An itemized statement of the proximate cost of the maintenance of the well and any overhead expenses, such as salaries.

(5) A statement as to the number of barrels of oil pumped to June 15, 1919, and the date from which production started, the price at which said oil was being marketed, and the name of the pipe line company to which it was being furnished.

(6) A general financial statement of the association to June 1, 1919, showing all assets and liabilities.

(7) The names of the officers receiving and disbursing the funds and whether or not said officers are under bond."

In said written request it was suggested that said statement be either published or filed with the secretary so as to be available for inspection by all parties interested on or before the 1st day of July, 1919.

79—*Where Fraud, Bad Faith or Mismanagement is Shown, Shareholders May Ask For a Receiver.*

It was further charged that the officers and trustees wholly failed and refused to furnish any kind or character of information as requested by said writing; that although the well on said 1¼-acre tract was completed during the last days of April, 1919; and was producing continuously since said date, no dividends were declared nor any information imparted to the stockholders; that said trustees incurred an indebtedness in excess of $10,000 over and above the receipts of said association and in addition to the funds that said company so misappropriated as hereinbefore alleged; that said well, instead of being revenue-producing, had been so mismanaged by the trustees as to be a loss and an expense rather than an asset; that said trustees were each and all insolvent; that on or about the 23d day of June, 1919, they executed a fictitious note to the defendant Dallam County Bank in the sum of $9997.32, due one day after date, bearing interest at the rate of 8 per cent. per annum from date, and at the same time executed to B. N. Richards, as trustee, a deed of trust conveying the said oil and gas lease and all the personal property, effects, tools, goods, wares, and merchandise belonging to the association for the purpose of securing payment of said note; that said note and mortgage were executed for the fraudulent purpose of enabling the bank

and Richards to dispose summarily of all the assets of said association and deprive the stockholders thereof; that the makers of the deed of trust and the defendant bank all well knew and were informed at the time of the execution of the note that the association was insolvent; that the proceeds from the well were little more than sufficient to pay the cost of operating the same in the manner in which it was being done, and that there was no possibility that the association or trustees would have any funds with which to discharge the note due one day after date; that plaintiffs were informed that the mortgaged property was being offered for sale under the deed of trust, and, unless restrained, it would be sold without notice to the shareholders and the money applied to the payment of said fictitious note; that the association had never at any time really been indebted to said bank, and, unless prevented, said bank would acquire title to and possession of all the property and effects of the association; that said trustees have not at any time given the duties incumbent upon them their personal attention, but that they placed the drilling of the well in charge of a person known to them to be unworthy of the trust and turned over to him large sums of money, without exacting a bond or other security from him; that the said person shortly thereafter absconded with about $2,000 of the funds of the association, which has never been recovered nor refunded nor any part thereof; that after said well began to produce oil they placed the same in charge of a person wholly inexperienced with such work, all to the great loss of the shareholders, and that they were paying such person a large salary for his services; that, although they made diligent effort by repeated requests to be furnished with a list of all the stockholders, the officers and trustees failed and refused to give them such information; that plaintiffs further requested and demanded that the books show-

ing the shares, interests, and amount of stock sold and issued and the books showing the receipts and disbursements of the company be exhibited to them, and such requests have been refused; that the treasurer heretofore informed and advised these plaintiffs that he had never been furnished with any kind or character of books of accounts, or handled any of the funds received by or paid out by the trustees, and that he knew nothing concerning the receipts and disbursements.

Plaintiffs charge that the defendant Bingham has in his custody and possession the books, accounts and records of the association, and although demand was made upon him in person to exhibit the same to plaintiffs, he has failed and refused and still fails and refuses to exhibit the same to them. Plaintiffs charge upon information and allege the facts to be that the trustees are now seeking to sell and dispose of all the property by alleged authority of the articles of the association, and, if permitted to do so, they will sell the same at a price far below its market value; that the trustees are wholly insolvent, as all of the assets of the association have been dissipated, save and except the property covered by the deed of trust, and all of the assets on hand out of which the plaintiffs have any present hope of receiving any portion of the funds consist of the proceeds of said assets, save and except such amounts as they may be able to recover from the defendants; that the oil from said well is being pumped from day to day by the Greater Texas Company, at an agreed price unknown to plaintiffs, and that the party in charge of the well is failing and refusing to pay said company for its services rendered in pumping the oil from said well, in consequence of which the Greater Texas Company is now threatening to take immediate possession of the well, tools, tanks, and other assets of the association, and that the trustees will not seek to prevent the same, and if they

do the said company will at once institute suit and levy court process upon all of said property and subject the same to the payment of their debt; that the said trustees have long since abandoned the direct management, supervision, or control of the affairs of the company, and have left the same in the hands of a wholly inexperienced person, to the great detriment of the shareholders; that said trustees are now offering for sale and may sell and dispose of the said property before they could be properly restrained by writ of injunction, for the reason that part of them are in the Burkburnett oil fields, a place where it is almost impossible to reach a person by court process of any kind promptly served upon them; that the trustees, defendants herein, being personally insolvent, and having spent, wasted, misappropriated and dissipated all of the funds of the association, and having incurred very very large indebtedness, and there being on hand but a small amount of assets out of which claims can be paid, it is of great importance that as much of same be saved as possible; that because said defendants may not have properly placed the title to the above-described real estate as required by the articles of the association, although it was paid for with the funds of the shareholders, it is essential that a receiver be appointed to take charge of the same, prevent its alienation, and hold it for the benefit of the plaintiffs; that others of the defendants than the trustees are now in the oil fields and in and about Burkburnett and Electra, their whereabouts being unknown, and cannot be reached by the ordinary process of law, so as to give them proper notice of this action within a reasonable time.

80—*Procedure in Appointment of Receiver.*

The first question to be considered is raised by the fifth proposition in the appellant's brief, by which it is asserted that

the appointment is void for the reason that it was made before the petition was filed and the suit instituted. It appears from the record that the petition was filed with the clerk of the district court of Dallam county July 18, 1919. The order appointing the receiver bears the same date, and there is nothing in the record to show that the order was made before the petition was filed. The rule is, as contended for by appellant, that the court has no right to appoint a receiver prior to the institution of the suit.[47] Accompanying the record is an affidavit made by the clerk of the district court of Dallam county in which he states that at the time the petition was filed with him on the 18th day of July the district judge had attached to and affixed to the petition his order and fiat appointing J. N. Cole as receiver of the Texline-Burk Oil Company. If this affidavit related to or affected the jurisdiction of this court, it could be considered, but since it goes to the jurisdiction of the trial court only, we cannot consider it. Courts of Civil Appeals will not hear evidence outside the record tending to show want of jurisdiction in the lower court.[48] Such being the state of the record, the presumption of the legality and regularity of official acts and that the proceedings of the trial court are regular and legal obtains, and this contention must be overruled.

The next proposition urged and to be considered is that, because the Texline-Burk Oil Company was not eo nomine made a party to the suit, the court had no authority to appoint a receiver for the property. While the proposition states the general rule, it should not be enforced here by reason of the broad

[47] Webb v. Allen, 15 Tex. Civ. App. 605, 40 S. W. 342; Howell v. Harris-Cortner & Co., 168 Ala. 383, 52 South 935; Ann. Cas. 1912B, 236, and note.

[48] Poole v. Mueller, 30 S. W. 951, (Tex. Civ. App.); T. & P. Ry. Co. v. Hood, 59 Tex. Civ. App. 363, 125 S. W. 982.

powers vested in the trustees by the signed articles. The effect of V. S. C. S. arts. 6149-6154, is to give the association a legal entity, distinct from its members, but the language of the statute is that such an association may sue or be sued in its distinctive name, but the last-named article provides that the chapter is merely cumulative to other remedies now existing under the law, and, even if it should be applied to suits instituted by shareholders against the officers or trustees of such an association, under the authorities as we understand them, the plaintiffs in such suit are not required to make the association as such a party. Admitting that the association has an entity separate from its members, it is in this case, according to the allegations of the petition, only a name, and at most the association is a beneficiary, not as a separate entity, but in the sense that it includes its stockholders who are the real cestuis que trustent. We were mistaken in the original opinion in stating that no association had ever been formed. Taking the allegations of the petition as true, the articles of association were sufficient to create the association.

81—*Officers May be Elected by the Trustees.*

The petition affirmatively alleges the formation of a joint-stock association, and further, that those who promoted it and signed the articles vested the management of all the affairs of the association in a named board of trustees and their successors; said board having the power to elect a president, vice president, secretary, and treasurer, and to create such offices as the board may deem proper, filling them by appointment. The instrument further vests the title to all property acquired or to be acquired by the company in such trustees as joint tenants under a declaration of trust. The trustees have full power

and authority, upon a vote of a majority of the board, to conduct the business of the company, make necessary repairs, borrow money upon such terms as they may deem proper, and to do and perform all things which in their judgment may be necessary in the management and conduct of the business. Their authority is limited only in that they are not to use the funds to secure oil and gas leases except as provided in article 2. In short, the articles of association substitute the trustees for officers, and confer upon them all the power and authority which are generally vested in the officers of such associations. It must be presumed from this statement of the powers conferred upon the trustees, limited only in the matter specified, that they were authorized to prosecute and defend suits in their own names.

82—*Shareholders May Sue for Themselves and Others.*

The plaintiffs, holding 200 shares of the stock, sue for themselves and for the use and benefit of all other shareholders who have bought and paid for their shares of stock. They excuse their failure to make all shareholders parties by the allegation that they have been denied the right to inspect the books and records, and that the defendants refuse to furnish them a list of shareholders. While this would not be an excuse for failing to make the association itself a party, the law relieves them of that duty when it is shown that the trustees, by virtue of their office, may sue and be sued. A recovery under such circumstances would be for the benefit of the association and all stockholders not parties, and a judgment in such an action would be res judicata of all matters litigated.[49] Nothing more than a technical reason is shown for making the association a

[49] Canadian C. v. Johnson, 176 S. W. 835 (Tex. Civ. App.).

party to the suit. It has committed no wrong, and indeed it is difficult to see how it could do so separate and apart from the trustees. As shown by the petition, the legal title to the property is in the board, and not in the association. The equitable title is in the stockholders and the association. No effort is made to dissolve the association, to dispose of its property, or wind up its affairs.

In a matter before the court of this state,[49i] where the legatee under a will sued the executor of the will who had conveyed land to a joint-stock company, joining as defendants in the suit only the trustees of the company, the instrument there, as in this case, vested in the company the legal title to the land in certain trustees and conferred upon them, as in this case, completed power over the property, including the right to convey it. Neither the company nor the stockholders were made parties. Exception was urged to the petition upon the ground of misjoinder in failing to make the stockholders parties. No objection was made because the company, as such, had not been made a party, but the disposition made of the demurrer and the language used in overruling it is applicable here. Quoting from Kerrison v. Stewart,[50] the court said:

"It cannot be doubted that under some circumstances a trustee may represent his beneficiaries in all things relating to their common interest in the trust property. He may be invested with such powers and subjected to such obligations that those for whom he holds will be bound by what is done against him, as well as what is done by him. The difficulty lies in ascertaining whether he occupies such a position, not in determining its effect if he does. If he has been made such representative,

49i Anderson v. Stockdale, 62 Tex. 54.

50 93 U. S. 160, 23 L. Ed. 843.

it is well settled that his beneficiaries are not necessary parties to a suit by him against a stranger to enforce the trust * * * or to one by a stranger against him to defeat it in whole or in part. * * * In such cases the trustee is in court for and on behalf of the beneficiaries; and they, though not parties, are bound by the judgment, unless it is impeached for fraud or collusion between him and the adverse party. * * * Here the trustees came within that principle, and it was not necessary to make the stockholders parties to the suit."

This is not an action by a third party, but, as shown by the petition, the plaintiffs and named defendants are all stockholders, and for a stronger reason the doctrine announced applies to this case. That the trustees would have the right in their own name to sue as individual stockholders to recover the amounts subscribed by them will not be questioned. If, under their powers, they can institute such a suit either in their own names or in the name of the association, we think the reverse of the rule unquestionably applies. The case as made by the pleadings is one in which the defendants, trustees, are sued by some of the beneficiaries, alleging insolvency of the trustees, breach of trust, misconduct, misapplication of trust funds, use of their authority as trustees of the fund for their own personal profit, refusal to account for and pay over income, fraud in executing a fictitious note and mortgage, loss of trust funds through employment of irresponsible parties selected by them to perform the very duties imposed upon them by the articles for personal execution, alleging danger of further loss by reason of negligence and carelessness, and we think the rules governing in cases of trust and the appointment for receivers for trust estates applies. City of Austin v. Cahill,[51] is a case

[51] 99 Tex. 172, 88 S. W. 542, 89 S. W. 552.

where the appellee sued the city, praying for a mandamus requiring it to levy a tax for the purpose of paying interest alleged to be due on certain bonds previously issued by the city. The contention was made that the bondholders who had not been made parties were necessary parties to the action. The Supreme Court held that the act of the legislature which created the sinking fund made the city a trustee for the benefit of the bondholders, and, contrary to the general rule, it was not necessary for the latter to be made parties. The opinion contains an exhaustive review of the authorities. After conceding the general rule that cestuis que trustent ought to be made parties, it said in part:

"To this rule there are well-recognized exceptions, but these embrace mainly that class of cases where, by reason of the number of beneficiaries, it is inconvenient to make them parties, and where it may be presumed that it was the intention to invest the trustees with power to prosecute and defend suits in their own names. An apt illustration of the exception is found in the case of the trustees in a mortgage to secure a series of negotiable bonds upon the property of railroad companies.[58] Another illustration is afforded by the case of an assignee in the deed of an assignment made by an insolvent for the benefit of his creditors.[58] The appointment of an assignee in such cases generally grows out of the necessity of having some agent to act for beneficiaries, who are usually too numerous to act together. In such case the presumption is great that he is their representative, not only as to the general management of the assets, but also to prosecute and defend suits involving title to the assigned estate."

[58] Shaw v. Railroad, 5 Gray (Mass.) 162.

[58] Kerrison v. Stewart, 93 U. S. 155, 23 L. Ed. 483.

In the City of Sherman v. Williams,[54] it was developed that a lot of land had been taken by the city to meet a tax collector's default as to a special fund created in the interest of outstanding bondholders. A judgment creditor of the city levied execution upon the property and caused it to be advertised for sale, when the city brought suit to enjoin the sale on the ground that the property, being held by it for the special fund mentioned, was not subject to sale to satisfy the execution. The city, it is apparent, was acting in effect as trustee for the outstanding bondholders, but the right of the city to maintain the suit was not questioned by counsel for the court, and the final relief prayed for was granted.

These causes declare the equitable doctrine of virtual representation, under which only parties must be joined who fairly represent the interest or right involved so that the case may be tried fairly and honestly.[55] The doctrine of virtual representation has been often recognized and applied in cases of trusts where those beneficially interested are represented by executors, administrators, assignees in bankruptcy, trustees in insolvency, conventional trustees for the benefit of creditors and receivers.[56] Chief Justice Marshall evidently had this rule in mind in Hopkirk v. Page, Fed. Cas. No. 6697, he said:

"Where the legal interest of one person is involved in that of another, and that other possesses the legal right so that the interest may be asserted in his name, it is not, I think, always necessary to bring both before the court."

The doctrine has in many cases been applied to members of

[54] 84 Tex. 421, 19 S. W. 606, 31 Am. St. Rep. 66.

[55] Smith v. Swornstadt 16 How. 288, 14 L. Ed. 942; Grafton v. Holt, 58 W. Va. 182, 52 S. E. 21, 6 Ann. Cas. 403.

[56] Baltimore v. United R., etc., Co., 108 Md. 71, 69 Atl. 436, 16 L. R. A. (N. S.) 1006.

unincorporated associations. Suits in equity may be brought by or against some of the members of the association as representatives of all the members, especially where the defendants in such cases were managing officers or trustees.[57] The rule has also been applied in a suit to enjoin a strike of laborers where the court held that it was sufficient to bring in the leaders of the strike to represent the organization, regardless of their official relation to their society. American Steel, etc., Co. v. Wire Drawers' etc. Unions,[58] states the rule in this language:

"As an exception to the rule that all persons having an interest in the subject-matter of an equity suit must be made parties, the doctrine of virtual representation which originated at an early date recognizes the right of a few persons to sue for themselves and all others similarly situated. Under this doctrine the persons who are not joined by name as parties are in a sense before the court. They have been called quasi parties and have even been said to be parties in substance and legal effect. In all cases to which the doctrine of representation applies there must be joined as parties persons who fairly represent the interest or right involved so that it may be tried fairly and honestly. It is sufficient if the parties before the court enable it fairly and fully to adjudicate the question involved. The parties represented must have a common interest with those before the court, and consequently the parties before the court cannot act as representatives, if their interests are antagonistic to those who would be represented. * * * And so a suit in equity may be brought by some of the members of the unincorporated association as representatives of all the

[57] Martin v. Dryden, 1 Gilman (Ill.) 187; Whitney v. Mayo, 15 Ill. 251; Goldman v. Page, 59 Miss. 404; Von Schmidt v. Huntington, 1 Cal. 55.

[58] 90 Fed. 598, 20 R. C. L. 669, Sec. 9.

members, whether organized for public or private purposes, and in some of the cases relating to the members of such associations stress has been laid on the fact that the members are numerous. The doctrine of representation has also been recognized in cases of trusts, so that persons beneficially interested are considered as represented by one occupying a trust relation, especially when the cestuis que trust are numerous so that it would be impracticable to bring all of them before the court."

Section II, Id., extends the doctrine to parties defendant, saying:

"Apart from the question of the parties being numerous, this rule of representation has been applied to defendants representing as trustees all parties having a beneficial interest in the subject-matter," etc.

The essence of the rule as recognized by the decisions is that where the party holding the legal estate is a party to the suit, those having merely an equitable interest need not be made parties defendant unless the rights of those holding the equitable interest are in some way antagonistic and adverse to that asserted by the plaintiffs. It is clear that in the instant case the Texline-Burk Oil Company, as such, could not, if it were a party, assert any adverse interest to that of the plaintiffs herein. The wrongs complained of by the plaintiff are certainly a violation of the rights of the association, as well as of all its members. In Carleton v. Roberts[59] the court says:

"While the rule that all parties in interest ought to be made parties is well established, so also are the exceptions to it. * * * Another is where parties form a voluntary association for public or private purposes, and those who sue or defend

[59] 1 Posey, Unrep. Cas. 587.

may fairly be presumed to represent the rights and interests of the whole. In these cases the suit may well be brought by the plaintiff, either alone or with others, in behalf of himself and all others interested."[60]

83—*Appointment of Receiver Discretionary with Court.*

Appellate courts will not ordinarily interfere in the appointment of receivers unless a clear abuse of discretion is shown.[61] In any event, under rule 62a (149 S. W. x) which provides that no judgment shall be reversed on appeal on the ground that the trial court has committed an error of law—unless the error complained of amounted to such a denial of the rights of the appellant as was reasonably calculated to cause, and probably did cause, the rendition of an improper judgment in the case, or was such as probably prevented the appellant from making a proper presentation of the case to the appellate court —the appointment without the association being a party is not reversible error. Appellants filed no motion to discharge the receiver, and did not raise the question of nonjoinder in the trial court.[62] We have discussed this question upon the theory that the association belongs to the class designated as "trusts."[62½]

It is not clear from the petition what authority the stockholders may have over the board of trustees in directing the affairs of the association, but some of the provisions of the articles of the association seem to indicate that, while the promoters intended to create a joint-stock association, yet, under

60 Story's Eq. Pl. 94, 97, 114 a, 115.

61 23 R. C. L. p. 10, Sec. 4.

62 Schuster et al. v. Crawford (Tex. Civ. App.), 199 S. W. 327, Slaughter v. American Baptist Publication Society, 150 S. W. 224.

62½ Wrightington Unincorporated Associations Page 4.

the rules of law announced in the decisions in section 14 in Unincorporated Associations, the Texline-Burk Oil Company should be held to be a partnership rather than a joint-stock association. Of course, if it is a partnership under the rules announced in that section, the association could not be sued by name, since a partnership, regardless of the name in which its business may be conducted, is not a legal entity.

84—*Beneficiaries May Have Trustees Removed for Cause.*

A necessary party is one who is so vitally interested in the subject-matter that a valid decree cannot be rendered without his presence as a party.[68] This being the test, it is clear, we think, that the association is not a necessary, though it may be a proper, party. Appellants have waived the question of non-joinder of proper parties by failing to raise it in the lower court. The case made by the pleading being one in which trustees are sued by some of the beneficiaries in behalf of others alleging insolvency of the trustees, breach of trust, misconduct, misapplication of trust funds, use of their authority as trustees of the fund for their own personal profit, refusal to account for and pay over income, fraud in executing a fictitious note and mortgage, loss of trust funds through employment of irresponsible servants selected by them to perform the very duties imposed upon them by the articles for personal execution, and danger of further loss by reason of want of care and attention, the rules governing in cases of trust and the appointment of receivers for trust estates apply. It its uniformly held that such facts, even under general equity practice, are grounds for the removal of such trustees and the appointment of receivers,

[68] Biggs v. Miller (Tex. Civ. App.), 147 S. W. 632.

where it appeared that the defendant was insolvent and was disposing of his property with the intention of placing it beyond the reach of his creditors. It must, however, clearly appear that the danger is real, and that the delay incident to the giving of notice will result in an irreparable injury, and the defendant should be afforded a speedy hearing on a motion to vacate the order."

In this case no motion was made, but the appellants content themselves with bringing the case to this court and attacking the trial judge's action solely upon the sufficiency of plaintiff's allegations to sustain it. Quoting further:

"Moreover, it has been held that a receiver will not be appointed without notice when a court has the powers to grant a temporary restraining order without notice and the same is ample to protect the property until notice is given and the application for a receiver heard and determined." Id. p. 39.

While it is true that a temporary restraining order might meet the ends of justice in so far as several grounds stated in the petition are concerned, as to others, even a mandatory injunction would not be an adequate remedy. These principles, of course, have been applied in jurisdictions where the remedy rests purely upon equitable rights, in this state the right to a receiver has been extended, broadened, and defined by statutory enactment. Article 2128, V. S. C. S. subd. 1, authorizes the appointment of receivers where partners or others jointly owning or interested in any property or funds show that the property or fund is in danger of being lost, removed, or materially injured. The facts alleged bring this case within that statute. They not only show danger of loss, but actual loss, and the effect of the statute is to entitle them to a receiver without further negativing the existence of an adequate remedy at law. Such has been the holding of the courts of this state

with reference to applications for injunction as well as for receivers.[65] In the case of Temple State Bank v. Mansfield,[66] it was shown by the petition that a trust fund in which appellee was interested was held by that bank with notice of the terms of the escrow agreement under which it was deposited; that the bank refused to furnish any information as to the condition of the account, referring the plaintiff for such information to one James E. Ferguson, who also failed and refused to furnish the desired information. There was no allegation of insolvency, but a prayer for a receiver. Judge Pleasants said:

"We think the allegations of the petition were sufficient to authorize the court to appoint a receiver of the fund. Subdivision 1 of article 2128, V. S. C. S., expressly authorizes the appointment of a receiver in an action between partners or others jointly owning or interested in any property or fund, on the application of any party whose right to or interest in the property or fund or the proceeds thereof is probable, and where it is shown that the property or fund is in danger of being lost, removed or materially injured. We think, when the trustee of a special fund held under an express trust not only refuses to execute the trust, but refuses to give any information to a joint owner of the fund as to its condition, or as to where or in whose name it is held or deposited, it may be reasonably inferred that the fund is in danger of being 'lost, diverted, misapplied, and put beyond the reach of plaintiff and of this court.' And such allegation in the petition in this case, being a reasonable inference from the facts alleged, is not a mere conclusion of the pleader.

The right to have a receiver appointed under any of the

[65] Acme Cement Plaster Co. v. American Cement Plaster Co. (Tex. Civ. App.), 167 S. W. 183.

[66] 215 S. W. 154.

first three sections of the article above cited is a legal right, not dependent upon the general rules of practice in courts of equity, and, when the facts alleged in a particular case as grounds for the appointment of a receiver bring the case within the provisions of either of these sections of the article, allegations and proof of insolvency of the defendant, inadequacy of legal remedy, or other equitable grounds for the appointment of a receiver are not required to authorize such action by the court.[67]

We are further of opinion that the facts alleged were sufficient to justify the trial court in concluding that for the full protection of plaintiff's rights the immediate appointment of a receiver was necessary and authorizing such appointment without notice to the appellant.

The allegations of a petition to which no answer was filed must be taken as true on hearing a motion of plaintiff to appoint a receiver.[68] We think the court was not only authorized by the allegations in the petition to appoint the receiver ex parte, but might have appropriately issued a temporary restraining order preventing the bank from proceeding to collect its fictitious note under the power of sale in the mortgage. The powers given the receiver, however, are probably broad enough to meet the emergency. The prayer of the petition does not specifically ask for the removal of the trustees, but it is said in High on Receivers:[69]

"When real estate has been devised to trustees upon certain specific trusts, and a receiver of the estate is appointed upon

[67] Cotulle v. Mortgage Co. (Tex. Civ. App.), 86 S. W. 339; Shaw v. Shaw, 51 Tex. Civ. App. 55, 112 S. W. 127; Sumner v. Crawford, 91 Tex. 130, 41 S. W. 994. (See, also, 23 R. C. L. p. 31, Sec. 28.)

[68] Simpson v. Alexander (Tex. Civ. App.), 188 S. W. 285.

[69] 4th Ed. Sec. 704.

the ground of their misconduct and incapacity, it is proper, upon the appointment of new trustees, that the management of the estate should be transferred from the receiver to such new trustees, and the court will so order if satisfied that it may be done without injury to the legatees under the will and when it is apparent that it will result to the advantage of the estate by doing away with the expense of the receivership. The prayer of the petition being for general and equitable relief, and the pleading failing to show the right of the beneficiaries to elect other trustees if need be, to succeed the receiver in the management of the estate, presents merely a question of practice resting in the sound discretion of the trial court, and is not ground for objection to the appointment of the receiver in the first instance."[70]

It would needlessly prolong the opinion to discuss the authorities cited by appellant in detail, and to show wherein we think they do not apply to the several allegations of fact contained in the petition. A summary of these allegations is made above, and the applicability of most of the authorities may be disposed of by the general statement that they are not cases applying to receiverships of trust estates. The petition, we think, shows a case clearly within the terms of the statute, and the matter of the appointment was within the sound discretion of the trial judge, and no such abuse of that discretion appears that would warrant this court in reversing his judgment. If upon a trial it should appear that the facts as alleged are not true, that the appellants are not guilty of the wrongs charged, and that the receiver was improvidently appointed under the statute and rules relating to receiverships, appellants have an ample remedy for any wrong inflicted.

[70] McCord v. Nabours, 101 W. 144.
Tex. 494, 109 S. W. 913, 111 S.

Believing that the conclusion reached in the original opinion is correct, the judgment is affirmed.

86—*Right to an Accounting.*

Any shareholders of an express contractual trust can call the trustee to account.[71] The beneficiaries under a trust have the right to be kept informed at all times concerning the management of the trust; and it is the duty of the trustees so to inform them. It is not generally presumed that the beneficiaries have such information from independent sources. When a bill is filed to call trustees to an accounting, any testimony throwing light on their management bears directly on the performance of this duty and may be considered in taking the accounts and in determining the view to be taken of the conduct of the trustees.[72] The trustees must render to their beneficiaries a full account of their dealings with the trust fund,[73] and their accounts should be open at all times on demand to the inspection of the shareholder.[74] Where a trustee by fraud or concealment makes a profit out of the sale of the trust property, the profit belongs exclusively to the shareholders and the trustee can be made to account for it although it is necessary to show that the profit was made at the beneficiaries' expense, that it was part of their property and would have been gained by them had the trustee performed his duties.[75]

[71] Hart v. Equitable Life Assur. Society, 172 App. Div. 659, 158 N. Y. Sup. 1063.

[72] Loud v. Winchester, 52 Mich. 174, 17 N. W. 784.

[73] Bone v. Hayes, 154 Cal. 759, 99 Pac. 172.

[74] Wylie v. Bushnell, 277 Ill. 484, 115 N. E. 618.

[75] Heckscher v. Blanton, 111 Va. 648, 69 S. E. 1045.

87—*Right to Protect Trust Property or Funds.*

While it is the duty of a trustee to protect the trust property, the general rule is that the shareholder, as the real party in interest, may maintain a bill in equity for the benefit of the trust estate to protect his own interests; in case the trustee neglects or refuses to act, or cannot sue on account of his own fraud or neglect of duty, or has acquired an adverse interest, the beneficiary may maintain a bill in equity for relief.[76] Every shareholder is entitled to the aid of a court of equity to avail himself of the benefit of the trust and the forbearance of the trustee may not prejudice him.[77] Upon refusal or neglect of a trustee to bring suit, a shareholder may sue to protect the trust estate; it must generally be alleged and proven that a demand was made on the trustee to sue and he refused to do so.[78]

88—*Rights Against Trustees and Others.*

If a shareholder be injured by his trustee failing to bring suit within the period of limitation on notes belonging to the trust estate, his remedy is against the trustee.[79] If a trustee has misappropriated the trust estate, the shareholder or a substituted trustee is not confined to the legal remedy of an action for damages against those who have illegally taken the trust estate, but may maintain an action in equity for a judgment requiring the property taken be returned to the possession of the trustee, at the same time compelling the wrongdoers to account

[76] Canada v. Daniel, 175 Mo. App. 55, 157 S. W. 1032; President & Trustees Bowdoin Col. v. Merritt, 54 Fed. 55.

[77] Morrill v. American Reserve Bond Co., 151 Fed. 305.

[78] Canada v. Daniel, Supra.

[79] Smith v. Smith, 19 S. W. 595.

for the interest and profits which they have received.[80] If a trustee conspires with a third party or exceeds his authority so as to benefit such third party to the beneficiary's injury, the latter may recover against such third party;[81] for equity will interfere at the suit of beneficiaries to prevent a trustee from doing anything tending to defeat the purposes of the trust.[82]

89—*Right to Reimbursement.*

A trust estate must, as a rule, bear the expense of its administration. Should one of a number of shareholders having a common interest in a trust fund take proper proceedings at his own expense to secure it from destruction, he is entitled to reimbursement for his expense, legal advice and costs, either from the fund itself or by proportional contributions from those who accept or receive the benefits of his efforts.[83]

90—*Right to Transfer and Assign Interests.*

A shareholder has power to assign his equitable interest in the trust fund to another.[84] He is entitled to a conveyance and may direct that it be made to another so as to pass his whole interest in the property;[85] just the same as a shareholder may purchase the interest of another,[86] and have a transfer of interests made on the books of the company. Where beneficiaries are induced by alleged fraudulent representation to assign their

[80] English v. McIntyre, 29 App. Div. 439, 51 N. Y. Sup. 697.
[81] Hall v. Houston & T. C. R. Co., 52 Tex. Civ. App. 90, 114 S. W. 891.
[82] McFerren v. Fidelity Trust Co., 140 Ky. 536, 131 S. W. 393.
[83] Ross v. South Delaware Gas Co. (Delaware), 89 Atl. 593.
[84] Riordan v. Schlicher, 146 Ala. 615, 41 South. 842.
[85] Boothe v. Cheek, 253 Mo. 119, 161 S. W. 791.
[86] Murry v. King, 153 Mo App. 710, 135 S. W. 107.

respective interests in the trust, the trustees cannot maintain a suit in equity for and on behalf of the beneficiaries to cancel the assignments or compel the assignee to account to the beneficiaries for the true amount due.[87]

91—*May Act as Trustees.*

Shareholders, as such, are not incapacitated from being trustee for themselves and others;[88] they may be appointed as trustees without affecting the validity of the trust.[89] The right of shareholders to act as trustees, or to appoint or elect new trustees should be fully and clearly set forth in the declaration of trust.[90] The fact that one is both trustee and beneficiary does not prevent him from acquiring the interest of another beneficiary.[91]

92—*Liability of.*

Ordinarily there is no liability attached to the shareholder. He does no contracting and has nothing to do with the business management of the trust; he has a right to inquire into the methods and good faith of the trustees and in proper cases, the right to file suit. If his suit should be groundless, the trustee may be entitled to retain from the beneficiary's share a proportionate amount for payment of attorney's fees.[92] An attorney's fee can not be charged in the bill of costs against the

87 Lovato v. Catron, 26 N. M. 168, 148 Pac. 490.

88 In re Fox's Estate, 264 Pa. 478, 107 Atl. 863; Story v. Palmer, 46 N. J. Eq. 1, 18 Atl. 363.

89 Nellis v. Rickard, 133 Cal. 617, 66 Pac. 32.

90 Crundy v. Drye, 104 Ky. 825, 48 S. W. 155.

91 Murry v. King, Supra.

92 Thome v. Allen (Ky.), 70 S. W. 410.

defeated plaintiff who as beneficiary brought a groundless suit for an accounting against his trustee; but the solicitor's fees and the expenses of the trustee in defense thereof are to be paid out of the complainant's share in the trust estate and not charged against the estate generally or against a general fund which the co-beneficiaries would have to contribute.[93]

93—*Not Liable as Partners.*

The shareholders are not made co-partners, nor liable as such for the expenses incurred by the trustees.[94]

94—*Ratification.*

The general rule is that a trustee can not take part in a transaction in which he has an interest adverse to the shareholders, but where this situation occurs, the latter, by retaining the consideration and not electing to terminate the contract, ratify it.[95] A trustee can not deal to his personal advantage with the trust estate, yet a shareholder can not allege an act on the part of his trustee to be a breach of trust which has been done under his sanction, procurement, or concurrence.[96] Where a shareholder—with full knowledge of all the facts—assents to a purchase by the trustee, and the price paid is adequate, he can not set aside the sale, though the trustee may make large profits by his purchase.[97] A shareholder whose trustee has made investment from trust funds in improper securities may retain the securities and thereby ratify the wrong;

[93] Patterson v. Northern Trust Co., 207 Ill. App. 361, 286 Ill. 564, 122 N. E. 55.

[94] Mayo v. Moritz, 24 N. E. 1083. See Partnership under paragraph Trusts Distinguished from other Organizations.

[95] Phillips v. Sanger Lumber Co., 130 Cal. 431, 62 Pac. 749.

[96] Ungrich v. Ungrich, 131 App. Div. 24, 115 N. Y. Sup. 413.

[97] Ungrich v. Ungrich, Supra.

or reject them and claim damages for wrongful investment; or claim damages and charge the securities that belong to the wrongdoer with a lien for the damages suffered.[98] For a shareholder to be estopped by ratification and acquiescence from complaining of an unauthorized investment by the trustee, he must have known of all the facts and been apprised of his legal rights,[99] and in addition he must know how the facts would affect his rights in equity.[100]

[98] In Re Mendel's Will, 164 Wis. 136, 159 N. W. 806.

[99] White v. Sherman, 163 Ill. 589, 48 N. E. 128.

[100] Internatl. Trust Co. v.

CHAPTER VIII.

TRUSTEES IN GENERAL.

95—*Appointment of.*

The creator of a trust has the power not only to designate the original trustees in the trust agreement, but also to provide for the appointment of successive trustees. Where an appointment is made under such power, the new trustee becomes vested with the title to the trust property and is clothed with the same powers as if he had been named originally; no conveyance need be made to him by the former trustee or his representatives—if he be dead.[1] A trust, valid at its inception is never permitted to fail for lack of a trustee; e. g., a conveyance in trust to two, one capable of taking and one not, will not become invalid by reason of the death of the competent trustee.[2] A trustee, having accepted appointment as such and having received the trust fund, will be estopped from questioning the creation of the trust, and from denying the right of the beneficiary to the trust fund.[3] Upon the refusal of a trustee to act, equity will either compel him to act, or will appoint another trustee in his place.[4] A trust can not fail for want of a trustee, or by the refusal of all the trustees to accept the trust;[5] equity

Preston (Wyo.), 156 Pac. 1128.

[1] Yates v. Yates, 255 Ill. 66, 99 N. E. 360; Stein v. Safe Dep. & Trust Co., 127 Md. 206, 96 Atl. 349.

[2] Farmers' Loan & Trust Co. v. C. & A. Ry. Co., 27 Fed. 146.

[3] Boehmer v. Silvestone, 95 Ore. 154, 186 Pac. 26.

[4] Anderson v. Phegley, 57 Ore. 172, 110 Pac. 975.

[5] Adams v. Adams, 86-80 U. S. Sup. Ct. 504.

will not permit a trust to fail for want of a trustee,[6] but will appoint one to execute the trust.[7]

96—*Hold Legal Title.*

Under the common law, the legal estate in the hands of a trustee possesses precisely the same properties, characteristics and incidents as if the trustee were the absolute owner.[8] Even though exclusive legal title to trust property is vested in the trustee,[9] he is merely the depositary of the legal title and his estate is but a power that may be exercised,[10] for the equitable title or ownership is in the beneficiaries. The rule is, the absolute ownership of property is suspended by the creation of a trust which vests the estate in the trustee[11] who comes into existence with the declaration of trust; he is the delegate of the trustor or creator, and needs no sanction from any further authority but derives his title from the instrument per se.[12] A trustee takes such estate as the purposes of the trust require and if a fee is necessary he takes it.[13] A trust contemplates the holding of property by one for the benefit of another, hence the same person may not at the same time be both sole trustee and sole beneficiary of the same interest.[14]

At common law the appointment of new trustees in succession, not in execution of a special power, does not vest title in

6 Hill v. Hill (Okla.), 152 Pac. 1122.

7 Brock v. Conkwright, 179 Ky. 555, 200 S. W. 962.

8 Randolph v. Hinck, 288 Ill. 99, 123 N. E. 273.

9 Welsh v. City of Boston, 221 Mass. 155, 109 N. E. 174.

10 Arnold v. Southern Pine Lum. Co. (Tex. Civ. App.), 123 S. W. 1162.

11 Dorman v. Balestier, 175 N. Y. Sup. 677.

12 In re Hoyt, 103 Misc. Rep. 614, 170 N. Y. Sup. 846.

13 Nixon v. Nixon, 268 Ill. 524, 109 N. E. 294.

14 Weeks v. Frankel, 197 N. Y. 304, 90 N. E. 969.

the new trustees without conveyance.[15] This rule has been changed by statute in a majority of the states and, of course, does not apply where the instrument provides that the title to property held by the trustees shall vest in their successors. The rule is also well established that where one of two or more trustees disclaims, the remaining trustee or trustees are vested with all the powers of the trust necessary to carry out the purpose.[16]

97—*Act as a Unit.*

In the absence of special agreement or special powers granted to the trustees, they act as a unit, for trustees of a trust estate hold as joint tenants unless there is a provision to the contrary. On the death of one trustee, administration of the trust devolves on the survivors and does not pass to the heirs.[17] The rule that a trust or power delegated to two or more jointly must be jointly executed applies as well to trusts coupled with an interest as to cases of mere naked powers.[18] Where the granting of a lease of trust property is an important and material act in the way of carrying out the trust, requiring an exercise of the judgment and discretion of both the trustees, it is necessary for both of them to execute the lease in order to make a valid instrument.[19] One of several trustees in whom confidence has been reposed jointly, with no power given to him to act singly—either expressly or by implication—can not

[15] Glazier v. Everett, 224 Mass. 184, 112 N. E. 1009.

[16] Stein v. Safe Dep. & Trust Co., 127 Md. 206, 96 Atl. 349; In re Kellogg, 214 N. Y. 460, 108 N. E. 844.

[17] Reichert v. Mo. & Ill. Coal Co., 231 Ill. 238, 83 N. E. 166.

[18] Dingman v. Boyle, 285 Ill. 144, 120 N. E. 487.

[19] Hoosier Mining Co. v. Union Trust Co., 173 Ky. 505, 191 S. W. 305.

sell the trust property without the consent of the others.[20] In law, there is not such a person as an acting trustee apart from his cotrustees, all who accept the office being acting trustees.[21]

98—*Act by Majority.*

Where there are several trustees, the instrument creating the trust may grant the trustees the power of acting by majority, and in the absence of such power, all must join in the deed.[22] While this seems to be the general rule, still in cases of urgent emergency, a majority might convey or bind the trust property;[23] and where there are three trustees, two of them as such might sell and assign trust property with the consent or concurrence of the third.[24] In spite of the rule that trustees can not delegate their power, they may be bound where they consent and concur in the actions of a single trustee, when he acts as agent for the others.[25] Hence the action of a single one of joint trustees may be ratified, if done in the legal way, by his cotrustees; "ratification" of a contract implying the giving of consent to, or the sanctioning of, its terms.[26] In the same manner, a contract, signed by the associate name of trustees and sealed without formal authority, becomes binding on the trust if a majority of the trustees expressly or impliedly by parol afterward adopt it.[27]

[20] Dodge v. Lacey (Tex.), 216 S. W. 400.

[21] Dingman v. Boyle, Supra.

[22] Page v. Gillett, 26 Colo. App. 204, 141 Pac. 866.

[23] Page v. Gillett, Supra.

[24] Fritz v. City Trust Co., 72 App. Div. 532, 76 N. Y. Sup. 625.

[25] Bunn v. City of Laredo (Tex.), 213 S. W. 320.

[26] Hoosier Mining Co. v. Union Trust Co., Supra.

[27] Rand v. Farquhar, 226 Mass. 91, 115 N. E. 286.

99—*Cotrustees.*

A trustee in general is responsible only for his own acts or defaults, and, except for his own fraud or negligence, is not liable for the trust property which has been in the exclusive possession and under the sole control of a cotrustee.[28] But if a trustee informs the beneficiaries of suspicious acts of his cotrustee, he is not relieved from liability arising from repetition of such conduct when he takes no steps to protect the trust funds in the future.[29] In so far as a cotrustee, though less active in management than his associate, participates in illegal acts resulting in loss to the trust, he and his estate must respond in damages.[30] The general rule is that where property is vested in three trustees, with power to bring suits, etc., one of them has no authority to institute a suit without the knowledge and consent of his cotrustees;[31] but where a trustee has committed a breach of trust, his cotrustee may, with or without the beneficiary or shareholder, sue to restore the property.[32]

100—*Substituted Trustees.*

Where a trust deed gives the power to appoint a substituted trustee in case the original trustee refuses or fails to act, the appointment confers no title on the substituted trustee if made before the original trustee resigns or is removed.[33] But when the substituted trustee qualifies in place of the prior trustee,

[28] Amer. Bonding Co. v. Richardson, 214 Fed. 897.

[29] In re Adams' Estate, 221 Pa. 77, 70 Atl. 436.

[30] Meldon v. Devlin, 31 App. Div. 146, 53 N. Y. Sup. 172; Barroll v. Foreman, 88 Md. 188, 40 Atl. 883; Appeal of Fesmire, 134 Pa. 67, 19 Atl. 502.

[31] McGeorge v. Bigstone Gap Imp. Co., 88 Fed. 599.

[32] Clemens v. Heckscher, 185 Pa. 476, 40 Atl. 80.

[33] Chesnutt v. Gann, 76 Tex. 150, 13 S. W. 274.

the trust in his hands is coextensive with and is as effective as if he had been named in the instrument originally.[34] Though a successor in a trust is not liable for the defaults or misconduct of his predecessor, yet he must obtain all the property of the trust, and for this purpose should investigate the acts of his predecessor and recover from him whatever belongs to the trust estate.[35]

101—*Attorneys as Trustees.*

Ordinarily, in the absence of statutory restrictions, any person may be appointed a trustee who is capable of confidence of holding real and personal property and of executing the trust. Though it is the custom of courts and the better practice to select a resident of the state as a trustee, yet they are not without power to appoint a non-resident; and there is no inherent incapacity in a married woman becoming a trustee and exercising the legal judgment and discretion belonging to that character.[36] Attorneys at law may be trustees either in trusts prepared by other parties, or in instruments prepared by themselves, and as such trustees, they are entitled to the same compensation as other trustees.[37] Where a trustee is also an attorney and renders legal services in connection with the trust estate, he will, in a proper case, be entitled to be paid for his professional services out of the common fund, as though the two capacities were separate.[38]

[34] Hayden v. Hayden, 178 N. C. 259, 100 S. W. 515.

[35] In re Lane's Will (Del.), 97 Atl. 587; In re Froelich's Estate, 50 Misc. Rep. 103, 100 N. Y. Sup. 436.

[36] 26 Ruling Case Law, 1272.

[37] Locke v. Cope, 45 Okla. 69, 146 Pac. 416; Willis v. Clymer, 66 N. J. Eq. 284, 57 Atl. 803.

[38] Taylor v. Denny, 118 Md. 124, 84 Atl. 369.

CHAPTER IX.

POWERS OF TRUSTEES.

102—*Express.*

The express powers are those which are set forth in the instrument authorizing the trustees to perform certain acts and duties; no particular form of words is necessary to create a power in the trustees, but it is essential that the intent to create the power appear,[39] for a trustee of an express trust derives his power from the instrument creating it and such instrument furnishes the measure of his obligation.[40] The power to act as a trustee does not come from the court, but is found in the instrument creating the trust.[41] Where trustees are invested with the legal estate, a power conferred on them is a power coupled with an interest which survives on the death of one of them, and may be executed by the survivor.[42] Where trustees are empowered by the instrument creating the trust to sell the estate, or do any specific acts, they may be compelled to perform specifically in accordance with the instrument.[43]

103—*Implied.*

Where a trustee conforms with the provisions of a trust in their true spirit and meaning, he may adopt measures and do

[39] Crawford v. El Paso Land Imp. Co. (Tex. Civ. App.), 201 S. W. 233.

[40] Ainsa v. Mercantile Trust Co., 174 Cal. 504, 163 Pac. 898.

[41] Reeder v. Reeder, 184 Ia. 1, 168 N. W. 122.

[42] Loring v. Marsh, 70-73 U. S. 802.

[43] Crawford v. El Paso Land Imp. Co., Supra.

acts which, though not specified in the trust instrument, are implied in its general directions and are reasonable and proper means for making them effectual.[44] Where a trust deed expressly or impliedly authorizes the trustee to sell realty belonging to the trust estate, no action of the court is necessary to effect a proper execution of the power thus conferred.[45] If a trustee is authorized to take up a mortgage and hold the property for favorable disposal, he has implied power to remortgage the property awaiting advantageous sale.[46] It being the duty of a trustee to protect the trust estate from waste, invasion, or trespass, and to defend suits against himself with respect to the trust subject, he has implied power to employ counsel therefor at the expense of the trust fund.[47] When a trustee who has possession of lands belonging to the trust estate is charged with the payment of debts, but has no power of sale, he has implied authority to lease upon such terms and conditions as usually prevail in the city or county in which the land is situated.[48] If a trustee is charged with a duty which cannot be performed without a power of sale, and no power of sale is expressly given, a power of sale will be implied.[49] The words "invest and manage" ordinarily would not impart or imply a power of sale, but it has been held that where a contrary intention cannot be found in the instrument taken as a whole, a sale might be made.[50]

[44] Kipp v. O'Melweney, 2 Cal. App. 142, 83 Pac. 264.

[45] Crown v. Cohn, 88 Ore. 642, 172 Pac. 804.

[46] Gilbert v. Penfield, 124 Cal. 234, 56 Pac. 1107.

[47] Stull v. Harvey, 112 Va. 816, 72 S. E. 701.

[48] Crown v. Cohn, 88 Ore. 642, 172 Pac. 804.

[49] Robinson v. Robinson, 105 Me. 68, 72 Atl. 883.

[50] Robinson v. Robinson, Supra.

104—*Discretionary.*

An instrument may prescribe all the steps to be taken by the trustee in all matters of detail likely to arise in the administration of the trust, but leave such incidental matters to the discretion of the trustees; however, this does not defeat the trust.[51] This discretionary power annexed to the office of trustee and intended to form an integral part of it, will survive to a trustee succeeding the original trustee; but it is otherwise where the powers are arbitrary and independent of the trust and not an integral part of it, for the discretion then would be personal.[52] Discretionary power jointly confided to three trustees by name to give all or any part of the fund to a certain person, can not, after the death of one of them, be carried out by the survivors.[53] A trustee may be empowered to hold or convey property according to his judgment; to collect the principal of securities and reinvest; but he may exercise his discretion only in doing authorized things; he cannot hold securities transferred to him which he is not authorized to hold.[54]

Trustees having general power to invest personalty and pay the income to shareholders, without direction as to the character of the securities in which the investment shall be made, may, after making an investment, sell the securities and reinvest in others, if prudent to do so.[55] If trustees are given discretionary power of investment and reinvestment, such power does not make it necessary that they be invested with the fee.[56] A trust agreement may provide that a sale cannot be made at

[51] Hoyt v. Bliss, 93 Conn. 344, 105 Atl. 699.

[52] Wilmington Trust Co. v. Jacobs, 9 Del. Ch. 77, 77 Atl. 78.

[53] Dillard v. Dillard, 97 Va. 434, 34 S. E. 60.

[54] Babbit v. Fidelity Trust Co., 72 N. J. Eq. 745, 66 Atl. 1076.

[55] Citizens' Natl. Bank v. Jefferson, 88 Ky. 651, 11 S. W. 767.

[56] In re Spreckels' Estate, 162 Cal. 559, 123 Pac. 371.

other than a specified price except on consent; if consent cannot be procured, the trustee may use his discretion to compromise claims according to his best judgment, using due care and good faith.[57] A trustee may follow the tactics of a prudent business man to secure a fair return of income and at the same time maintain the corpus of the principal intact.[58] Where a testamentary trust provides that the trustees may sell the property and reinvest as often and in the manner they see fit, it clothes the trustee with discretionary power to dispose of any part of the trust fund to pay the inheritance tax.[59] Where a discretionary power is vested in trustees to alienate real estate belonging to the trust, a purchaser is not bound to make inquiry as to whether the trustees have properly exercised their powers.[60]

A trustee of realty may have full power to sell the same, but his discretion as to the investment of the proceeds of the sale will not be interfered with if the rights of the beneficiaries have not been jeopardized; and the purchaser is not required to see that the proceeds are invested according to the trust.[61] A trustor may endow trustees with very wide discretion, and so long as they keep within the limits of fairness, the courts may not arbitrarily interfere with or control the manner in which they shall discharge their duty.[62] A court of equity may restrain a trustee from abusing his power, but it can not control the exercise of the discretion vested in him by the trust agreement.[63] Nor will a trustee's exercise of a discretionary power

[57] Brackett v. Middlesex Bank Co., 89 Conn. 645, 95 Atl. 12.

[58] Warren v. Pazolt, 203 Mass. 328, 89 N. E. 381.

[59] Shaw v. Bridgers, 161 N. C. 246, 76 S. E. 828.

[60] Dickson v. N. Y. Biscuit Co., 211 Ill. 468, 71 N. E. 1058.

[61] Campbell v. Virginia-Carolina Chem. Co., 68 S. C. 440, 47 S. E. 716.

[62] Keating v. Keating, 182 Ia. 1056, 165 N. W. 74.

[63] Brackett v. Middlesex Bank. Co., Supra.

be reviewed by the court unless his action or refusal to act is arbitrary and unreasonable.[64] Where a discretionary power is conferred on trustees to alienate real estate belonging to the trust, a court of equity will never interfere therewith in the absence of allegation and proof of actual fraud or collusion of the parties to the conveyance.[65]

105—*Personal.*

Where a power is a matter of personal confidence which is to be executed in the discretion of the trustee, it cannot be extended beyond the express words and clear intention of the trustor, and cannot be exercised by a trustee appointed by the court upon the death of the original trustee,[66] for the power conferred upon a trustee which involves personal confidence in him, terminates with his death.[67] Where the power conferred on the trustee is not a personal one, but is one belonging to the office and one such as could be exercised by his successor, then the power survives to the new trustee appointed.[68] A trustee may or may not have an interest or share in the trust property, if he has, he may convey his interest just the same as any other shareholder.[69] Generally, a trustee may resign at any time and so a resignation in the manner pointed out by the trust instrument will be valid.[70]

64 Stein v. Safe Dep. & Trust Co., 127 Md. 206, 96 Atl. 349.

65 Dickson v. New Y. Biscuit Co., Supra.

66 Whitaker v. McDowell, 82 Conn. 195, 72 Atl. 938; Woddrop v. Weed, 154 Pa. 307, 26 Atl. 375.

67 Russell v. Hartley, 83 Conn. 654, 78 Atl. 320.

68 Vernoy v. Robinson, 133 Ga. 653, 66 S. E. 928; Jencks v. Safe Dep. & Trust Co., 120 Md. 626, 87 Atl. 1031.

69 Anderson v. Phegley, 57 Ore. 172, 110 Pac. 975.

70 Stearns v. Fraleigh, 39 Fla. 603, 23 So. 18.

106—*Incidental.*

A trustee invested with the control of property and not expressly or impliedly prohibited from incurring expenses for improvements, may make improvements, and on a settlement of his account, receive credit therefor.[71] Where a trust deed empowers trustees to take possession of, manage, control, lease, mortgage, sell, and convey the land constituting the trust estate and invest the proceeds as the trustees shall deem advisable, the trustees have power, in consideration of the lessee's covenant to place buildings on the land which would enhance the value of the trust estate, to give option to a purchase.[72] Where trustees are given full power to sell, mortgage, lease, and reinvest the proceeds in their discretion, they have power to buy in an outstanding claim as a cloud on their title.[73] The doctrine that one acting in two different capacities cannot contract with himself does not prevent a trustee of different trust estates from transferring securities of one estate to himself as trustee of another estate. If he acts in good faith within the limits of his authority, and the full value of the securities transferred is paid by one estate and received by the other, and the intention to transfer title is carried out so far as it can be without making a formal assignment, the transfer will be regarded in equity as executed as against a subsequent transferee who wrongfully obtains the securities from the trustee.[74]

It is proper for the trustee to charge the estate with the services of the lawyers engaged to draw up the trust instrument and give advice concerning the accomplishment of the object of

[71] White v. Hall, 113 Va. 427, 74 S. E. 212.

[72] Crown v. Cohn, 88 Ore. 642, 172 Pac. 804.

[73] Hull v. Chaffin, 54 Fed. 437.

[74] French v. Hall, 198 Mass. 147, 84 N. E. 438.

the trustor.[75] A trustee has power to employ counsel to assist in the management of the trust, and to burden the trust estate with a lien for counsel's services.[76] In like manner the trust estate may employ counsel either to resist an effort to remove a trustee without cause or to bring about a removal where sufficient cause is shown; and procure the appointment of a new trustee in place of the one so removed.[77] A trustee is always charged with good faith and discretion, and he should not be penalized for settling a claim which in the exercise of good business judgment he deemed it wise to settle.[78]

107—*Restricted.*

Where a trust provides that the trustees shall at all times keep the premises free from any and all incumbrances other than a mortgage referred to in the deed, the execution by the trustees of another mortgage would be in contravention of the trust and void.[79] While a trustee has power to make whatever repairs are necessary for the preservation of the estate, a trustee of land under a deed, not expressly authorized to make large or extensive improvements, has no power to erect buildings thereon; his contract therefor is not binding on the trust estate.[80] If trustees lease land for a term extending unreasonably beyond the period that the trust is likely to continue, the excess only will be void.[81] A trustee has no inherent power

[75] Babbit v. Fidelity Trust Co., 72 N. J. Eq. 745, 66 Atl. 1076.

[76] Dolph v. Cincinnati B. & C. R. Co., 56 Ind. App. 137, 103 N. E. 14.

[77] Jessup v. Smith, 223 N. Y. 203, 119 N. E. 403.

[78] Mann v. Day, 199 Mich. 88, 165 N. W. 643.

[79] Gardiner v. Cord, 145 Cal. 157, 78 Pac. 544.

[80] Maynard v. Columbus, 150 Ky. 817, 150 S. W. 1019.

[81] In re Hubbell Trust, 135 Ia. 637, 113 N. W. 512; Gomez v. Gomez, 81 Hun. 566, 31 N. Y. Sup. 206.

to sell the trust property, either expressly or by clear implication; he has only such powers as are given by the instrument.[82] A trustee has no authority to appoint his successor unless such authority is expressly conferred on him.[83] A trustee, without express authorization, cannot invest the funds in speculative stocks without personal liability;[84] nor can he take money committed to his care under cover of an investment and loan it to himself.[85] Neither can a trustee by his own voluntary act, change his capacity and convert himself into a mere debtor.[86] One of two cotrustees has no power to use a note belonging to the trust fund which is payable to both trustees for payment of his individual debt, nor can he indorse his cotrustee's name thereon without his consent.[87]

[82] Wisdom v. Wilson, 127 S. W. 1128; Crawford v. El Paso Land Imp. Co., Supra.

[83] Birmingham Belt R. Co. v. Gerganous, 142 Ala. 238, 37 South. 929.

[84] White v. Sherman, 163 Ill. 589, 48 N. E. 128.

[85] Carrier v. Carrier, 226 N. Y. 114, 123 N. E. 135.

[86] Marshall v. Marshall, 11 Colo. App. 505, 53 Pac. 617.

[87] Barroll v. Foreman, 88 Md. 188, 40 Atl. 883.

CHAPTER X.

DUTIES OF TRUSTEES.

108—*To Manage Property for Shareholders.*

A trustee with or without joint beneficial interest in the trust property is accountable only for the management of the property in the mode pointed out by the settlor in the trust instrument, as an ordinarily prudent business man would be required to do under like circumstances.[88] He performs this duty by managing, preserving, improving, and keeping the property in a way that will be beneficial to the shareholders, as expressed or implied in the declaration of trust.[89] Just so is it the duty of a trustee, not only to hold and manage the property for the shareholders, but also to disburse the proceeds to the beneficiaries according to the terms or circumstances of the creation of the trust in and out of the estate.[90] Where the instrument provides for the continuing of business so long as a certain profit is obtainable, the business should be continued by the trustee while such profit is being obtained.[91]

While a court of equity may empower trustees to sell, mortgage, improve, lease or otherwise deal in property, in contemplation that expectant interests shall be carefully safeguarded so that the corpus of the estate shall be kept intact until termination of the trust; still the only change permissible is in

[88] Wilson v. Smoot, 186 Ky. 194, 216 S. W. 129.

[89] Wilson v. Smoot, Supra.

[90] Teal v. Pleasant Grove Local Union, 200 Ala. 23, 75 So. 335.

[91] In re Froelich's Estate, 50 Misc. Rep. 103, 100 N. Y. Sup. 436.

the form of the property for the purpose of conserving the principal.[93] A trustee's duty is to the trust and he may not abandon the trust and substitute another in his place as trustee, but must proceed in the execution of the trust and cannot terminate it by his act or default.[93] If a trustee obtains knowledge of facts that would defeat the title of the beneficiaries and give it to another, he is not justified in communicating the facts to the other person; his duty is to manage the property for the beneficiaries and not make admissions prejudicial to the rights of the beneficiaries.[94] Nor can a trustee rid himself of the duty to warn and to denounce, if there is improvidence or oppression which he may discover.[95]

109—*To Carry Out the Trust.*

It is the duty of each trustee, and of the court, to carry out the trust, and a trustee cannot relieve himself of this duty by agreement with his co-trustees to look after only certain parts of the trust property.[96] A trustee cannot justify his failure to perform the duties of the trust by showing that no one asked him to perform them.[97] Being the agent of both parties, it is his duty to look to the rights and interests of the trust debtor as well as to those of the trust creditor; he is bound to act impartially between them.[98] A trustee must invest the trust fund as directed, so that it may yield an income to the bene-

[93] Lee v. Albro, 91 Ore. 211, 178 Pac. 784.

[93] Anderson v. Phegley, 57 Ore. 172, 110 Pac. 975.

[94] Boehmer v. Silvestone, 95 Ore. 154, 186 Pac. 26.

[95] Globe Woolen Co. v. Utica Gas & Elec. Co., 224 N. Y. 483, 121 N. E. 378.

[96] Hayes v. Pratt, 13 Sup. Ct. Rep. 503.

[97] Cotton v. Rand (Ky.), 92 S. W. 266.

[98] Hartman v. Evans, 38 Va. 669, 18 S. E. 810.

ficiary;[99] if it becomes necessary in carrying out the trust to employ counsel to protect the trust, it may be done, just the same as it is the duty of a trustee against whom legal proceedings have been instituted to employ counsel, and, as incident thereto, to appropriate so much of the trust estate as is necessary to compensate him reasonably for his services. Even where the trustee absconds, and so loses his right to an allowance for services and counsel fees, as between the trust estate and himself, the counsel employed by him has a right of action against the shareholders to whom he has rendered necessary and beneficial services.[100]

When the trustees carry out the spirit of the trust and conduct the business along the same general lines as the testator did in his lifetime or according to the will of the trustor, then it may be said that the trustees are fulfilling their trust and are free from attack from any source. This principle is shown clearly in the following case:[1] One Andrew Froelich, deceased, created a trust estate in a foundry by will; the original trustee having resigned, a substitute trustee was appointed who kept the foundry in operation under the trust. The substitute trustee was met with opposition in filing his accounts; the language of the court in sustaining the trustee's position is of such import that it is given herein in full:

"The substituted trustee, on presenting his accounts for settlement, is met by several objections which will be taken up in the order in which they are stated, as follows: First, whether or not the trustee should have paid rent for the foundry of the deceased for the use of the same in carrying on the business

[99] Smith v. Robinson, 83 N. J. Eq. 384, 90 Atl. 1063.

[100] Manderson v. Appeal, 113 Pa. 631, 6 Atl. 893.

[1] In re Froelich's Estate, 50 Mis. Rep. 103, 100 N. Y. Sup. 436.

of the deceased; second, whether the business should be continued by the substituted trustee; third, whether the trustee should not be charged with the amount of loss arising from the conduct of the business during the administration; fourth, whether the trustee should not be charged with salary paid to himself; fifth, whether the trustee should not be charged with the entertainment moneys expended by him; sixth, whether or not Caroline Wolf is entitled to certain rents by virtue of the decease of her infant daughter; seventh, whether the trustee is entitled to commissions.

Most of these provisions arise in consequence of a trust which was created by the deceased and which directed the trustees to use all the property pertaining to such business as was left by the testator for that purpose. There was also a further provision which gave all of the residuum of the estate to the trustees, to collect the rents and income therefrom and pay the same to certain beneficiaries designated by the deceased. It appears that part of the estate of the deceased was a certain foundry, and the trustees, in their management of the estate, charged against the business the rent for the foundry and paid the amount so charged into the trust of the residuum of the estate. The present trustee has refused to do this, and contends that, while the method adopted by the preceding trustees, under which this was done, produced no harm either to the estate or to the beneficiaries thereunder, there was no obligation upon him to do the same, as, when the testator gave all of the property pertaining to his business in trust to continue the said business, he must necessarily have included the foundry.

I think this contention is correct. There is no more reason why the trustees should charge themselves with rent for the foundry than there is that they should charge themselves for the hire of the various tools and appliances required in such

business. It will be observed, of course, that the net result to the beneficiaries under the trust is not affected, no matter which course is adopted, as in the one case it simply means that the income derived from the trust pertaining to the real estate is larger, whereas in the other case it means that the income derived from the trust in regard to the business is the larger. In other words, this is solely a matter of bookkeeping. But the real importance of the question arises in connection with the proviso in relation to the carrying on of the business, which directs that the same shall be discontinued when the trustees' management of the business fails to produce a certain amount of profit; and the question, therefore, of what are the running expenses of such business, becomes very important in determining whether the trustees have continued such business for a longer period than was permitted by the testator.

The disposal of the above question practically disposes of the second question as to whether the limitation under which the business was to be conducted has been reached or not, as, if the amount which has been charged up for rent be held not to be one of the expenses of such business within the contemplation of the deceased, then the limitation contained in his will has not been reached. In this connection I might say there are several items charged as expenses of the business which, in my judgment, should not be regarded as running expenses but as items in the way of renewal. These items are in the nature of the purchase of new horses and other matters of that kind.

110—*Substituted Trustee May Follow Business Methods of Predecessor.*

As to the question of the loss incurred in the business during the administratorship of the substituted trustee, it appears that

there is no direct proof that there has been any loss occasioned by any lack of attention on the part of such trustee, and the contestant is the last person in the world in a position to make any such suggestion. Her doing so is one of the most amazing pieces of affrontery that has, in my judgment, ever been displayed in a court of justice. The contestant, the widow of the deceased, was originally one of the trustees. As such trustee, she was allowed to receive 10 per cent of the profits of the business for her compensation in managing the same. It appears, also, that, instead of taking personal control and management of such business, she employed one Wolf to manage the same for her, for which he was paid a large salary. The present substituted trustee, who is her son, occupied a subordinate position in the business. After a period of time, it appears the contestant married this man Wolf. Subsequently she rendered her account as trustee and resigned. With the money for the commissions which were due her a new company was formed, in which Wolf, her husband and foreman of the business of the deceased, was the president, but to which he did not contribute a dollar of his own money. He immediately started such business in active opposition to the business which he had been managing for her when she was trustee of this estate.

It was under these circumstances that the son of the deceased was appointed a substituted trustee. He has taken charge of the same and run it to the best of his ability. There is not a particle of testimony as to any specific act of neglect or omission on his part, or any suggestion that, under any other kind of management, under the peculiar circumstances which he had to contend with, any better results could have been obtained, other than the fact that the receipts of the business under his management have not been as great as under that of the previous trustee. To permit this contestant, the former trustee,

who, as the tool of her husband, is doing her utmost to destroy this business, to use so much of the destruction she has wrought as a means of punishing her son, is in my judgment absolutely without reason. If there is any person who should merit the censure of the court, it is the mother who would treat her son in any such unnatural way as this and the man who would use the means obtained by his marriage in endeavoring to destroy the property left by his predecessor, the first husband of this woman.

The statement of this question brings us to the proposition contained in the fourth objection. As I have stated, the contestant got her commissions in full, and her husband, who had practically performed her own work, also received a salary as manager of the company. The substituted trustee did not attempt to obtain his money by any such subterfuge as that, but increased his salary which he had been getting while working in that business, though to a sum which was much less than that which had been previously drawn by his stepfather. I appreciate the contention that the commissions of an executor or trustee are the ordinary measure of his compensation. But where this estate had been run for years with the concession that it was necessary to have a manager for the business, and where this trustee simply carried on the practice adopted by the prior trustee at a reduced expense to the estate, it does not seem to me that it can now be urged for the first time that such a salary should not be permitted. Certainly this contestant, who has not only benefited by this course, but to an extent which enables her to go into a business to destroy that left by the testator, is the last person who should be given any serious consideration by a court of justice in her views on the subject. The determination of this question will, therefore, dispose of

the seventh objection in relation to the commissions of this substituted trustee.

The fifth proposition is in relation to what is known as entertainment moneys. It appears to have been conceded since the death of the testator that in the conduct of the business it was necessary that certain items should be expended for the entertainment of buyers in order that by so doing their good will could be secured. This practice has been recognized by expenditures which have been approved of in all of the previous accounts and has been continued by the substituted trustee herein. There is nothing to show that the amounts which he expended have been improper or incorrect. It stands to reason that such items cannot necessarily be accompanied by vouchers, so that the trustee could give a careful statement in regard to the same, as he would do in the case of the ordinary items of an executor's or administrator's account. It is but fair to assume that, as this was a practice which was carried on by the business during the life of the testator who, in directing his trustees to carry on such business, appreciated that this would be a necessary matter for them to attend to in order that the business might be managed with the same degree of profit as was attained during his lifetime."

III—*To Account.*

A trustee may be held to a strict accounting and to the exercise of the utmost fidelity towards the beneficiaries.[2] Where he is called upon to account, the burden of making a proper accounting is upon him, and upon his failure to do so all intendments are against him.[3] So a trustee may be called upon

[2] Arnold v. South. Pine Lum. Co. (Tex. Civ. App.), 123 S. W. 1162.

[3] Stockwell v. Stockwell's Estate, 92 Vt. 489, 105 Atl. 30.

to account for a single item or transaction, and is not relieved by showing that for other items he was not liable.[4] A trustee who has once actually received the funds of the trust estate cannot discharge himself from accounting to the shareholders by showing they were lost by his own neglect. In such case a suit against him by the shareholders to recover the estate is not based upon his neglect, but upon his actual receipt of the estate; the case is not varied if the suit be against the devisee to the delinquent trustee.[5] If a trustee uses the balances of the trust funds for his own benefit, without accounting for the profits so realized, he may be charged with all profit and removed for breach of trust.[6] For where a trustee by fraud or concealment makes a profit out of the sale of the trust property, the profit belongs exclusively to the beneficiary; but it is necessary to show that the profit was made at the beneficiary's expense, and that it was part of his property and would have been gained by him had the trustee performed his duties.[7]

Where a trustee purchases bonds with trust funds and turns them over to the trust estate at an enhanced price—treating the difference as his individual profit—the investment must be regarded as the estate's from the time of the purchase.[8] In an action for an accounting where the trustees admit they have received the property, the burden is on them to show that they have exercised reasonable skill, prudence, and judgment;[9] for the trustees must prove the credits claimed,[10] and that services

[4] Joseph v. Herzig, 135 App. Div. 141, 120 N. Y. Sup. 34.

[5] Lindsley v. Dodd, 53 N. J. Eq. 69, 30 Atl. 896.

[6] Bobb v. Bobb, 89 Mo. 411, 4 S. W. 511.

[7] Heckscher v. Blanton, 111 Va. 648, 66 S. E. 859.

[8] Campbell v. Campbell, 8 Fed. 460.

[9] Ashley v. Winkley, 209 Mass. 509, 95 N. E. 932.

[10] Stockwell v. Stockwell's Estate, Supra.

performed by counsel were for the trust estate and not for themselves individually.[11]

112—*To Keep Books.*

A trustee must keep accurate accounts of all his transactions and render a true statement supported by proper vouchers; if he does not, every presumption of fact is against him and he cannot impose upon the shareholders the obligation to prove that he has actually received what he should have received, or that he has not expended what he claims to have paid out.[12] It is the duty of a trustee to keep a true and accurate account of his trust and make due and proper reports thereof, and make payments due without delay.[13] Where a trustee has negligently failed to keep true accounts or has refused to account, all presumptions are against him on a settlement.[14] Where he fails to keep his accounts in an intelligent manner, the penalty is to charge him with the value of the use of the trust property for the purpose to which it is devoted, and to credit the sum with legitimate expenses and reasonable compensation.[15]

113—*To Use Prudence and Care.*

A trustee must use such care for the safety of the trust fund as a man of ordinary prudence might use in business of a similar nature; he is held to a strict accountability for a faith-

[11] Mann v. Day, 199 Mich. 88, 165 N. W. 643.

[12] Red Bud Realty Co. v. South., 96 Ark. 281, 131 S. W. 340.

[13] Smallwood v. Lawson, 183 Ky. 189, 208 S. W. 808; Stockwell v. Stockwell's Estate, Supra.

[14] Bone v. Hayes, 154 Cal. 759, 99 Pac. 172; Smith v. Robinson, 83 N. J. Eq. 384, 90 Atl. 1063.

[15] Wilson v. Smoot, 186 Ky. 194, 216 S. W. 129.

ful performance of the duties of his trust.[16] It is not required that the trustee exercise extraordinary care, but only the care required of a man of common prudence in his own business;[17] for he is not an insurer of the property or a guarantor of any income therefrom, and will be held to the use of only ordinary care in making it income-producing.[18] A trustee's obligation to his trust is satisfied by the exercise of the same degree of diligence that a man of ordinary caution would be expected to exercise in the care of his own property under the same circumstances.[19] Whether a trustee exercises common prudence in any particular case is a question for the jury;[20] when he is wanting in common prudence in the management of the trust fund and a loss results, he will be surcharged.[21]

114—*To Exercise Good Faith and Sound Discretion.*

In the general management of the trust, the trustees are not liable for the consequences of an error in judgment, unless the error is such as to show that either they acted in bad faith or failed to exercise sound discretion.[22] Good faith and sound discretion, as those terms are understood by reasonable men of good judgment, are the standard by which the conduct of trus-

16 Boehmer v. Silvestone, 95 Ore. 154, 186 Pac. 26; Wylie v. Bushnell, 277 Ill. 484, 115 N. E. 618, Winder v. Nock, 104 Va. 759, 52 S. E. 561; Bourquin v. Bourquin, 120 Ga. 115, 47 S. E. 639.

17 Klugh v. Seminole Securities Co., 103 S. C. 120, 87 S. E. 644.

18 Dillivan v. German Sav. Bank (Ia.), 124 N. W. 350; In re Darlington's Estate, 245 Pa. 212, 91 Atl. 486.

19 American Bonding Co. v. Richardson, 214 Fed. 897.

20 Klugh v. Seminole Securities Co., Supra.

21 In Re Hart's Estate, 203 Pa. 480, 53 Atl. 364.

22 Taft v. Smith, 186 Mass. 31, 70 N. E. 1031; Klugh v. Seminole Securities Co., Supra; Dillivan v. German Savings Bank, Supra; Clay v. Thomas, 178 Ky. 199, 198 S. W. 762.

tees is to be measured.[23] Whether a trustee acts in good faith and exercises sound discretion will be determined with reference to the situation at the time of the transaction, and not in the light of subsequent events which could not have been reasonably anticipated.[24] Where the trust instrument leaves large discretion in the management of the trust to the trustees, it is not within the province of the court to direct them how to exercise such discretion; it is their duty to use their own discretion, in the exercise of which, within legal limitations, they will be protected.[25] But the burden of proof of the "exercise of good faith and sound discretion" is cast upon the trustee, under the peculiar facts in a case;[26] and though a trustee is required to exercise good faith and reasonable diligence, he is not an insurer against losses occasioned by the bad faith of his co-trustee.[27]

The rule is that trustees are bound to a fair exercise of their judgment and to the unselfish exercise of good faith; while supine negligence or wilful default will render them liable, mere errors of judgment will not.[28] But where the trustee acts in good faith and employs such vigilance, sagacity, diligence, and prudence as, in general, prudent men of discretion and intelligence employ in like matters in their own affairs, they are not responsible for errors of judgment.[29] They must, however, follow the terms prescribed by the deed of trust, and if there

[23] Kimball v. Whitney, 233 Mass. 321, 123 N. E. 665.

[24] Taft v. Smith, Supra; Warren v. Pezolt, 203 Mass. 328, 89 N. E. 381.

[25] Bartlett v. Pickering, 113 Me. 96, 92 Atl. 1008.

[26] Beam v. Patterson Safe Dep. & Trust Co., 82 N. J. Eq. 518, 91 Atl. 734.

[27] In re Adams' Estate, 221 Pa. 77, 70 Atl. 436.

[28] Ainsa v. Mercantile Trust Co., 174 Cal. 504, 163 Pac. 898.

[29] Costello v. Costello, 209 N. Y. 252, 103 N. E. 148.

is any material failure in this regard, their acts may be invalid, or they may be guilty of a breach of trust.[80]

[80] McCaughn v. Young, 85 Miss. 277, 37 So. 839.

CHAPTER XI.

LIABILITY OF TRUSTEES.

115—*Personal.*

A trustee acting in his fiduciary capacity without properly limiting his liability will be held personally bound by contracts he makes as such trustee; the mere use of the name of trustee will not discharge him, but to protect himself from individual liability he must expressly stipulate therefor;[31] for in the absence of special limitation, a contract by a trustee relative to the trust property binds him personally.[32] The rule seems to be that a trustee holding a trust estate, with general power of management, is personally bound by contracts which he makes as trustee, unless there is an express provision showing that both parties agree to relieve him from personal liability.[33] If a trustee contracts with a broker to sell property, without reference to the capacity in which he holds it—omitting to exempt himself from personal liability—and the broker intends in good faith to look to the trustee individually for his commission without regard to the manner or capacity in which he might convey the property, the trustee is personally bound.[34] So where trustees contract for work and material on a building and do not exempt themselves from personal responsibility or provide

[31] Feldman v. Preston, 194 Mich. 352, 160 N. W. 655; Bried v. Mintrup, 203 Mo. App. 567, 219 S. W. 703.

[32] Hussey v. Arnold, 185 Mass. 202, 70 N. E. 87; Carr v. Leahy, 217 Mass. 438, 105 N. E. 445.

[33] Knipp v. Bagby, 126 Md. 461, 95 Atl. 60.

[34] Bried v. Mintrup, Supra; Knipp v. Bagby, Supra.

that the other party look to the trust estate for payment, by adding the word "trustee" to their names,[35] they are bound personally.

If trustees, in transferring a trust estate, violate any legal or equitable duty or contravene principles which the law charges them to observe, to the beneficiaries' injury, they are guilty of constructive fraud, regardless of their motive or intention; a purpose to defraud is not essential to constructive fraud as the law regards the act which gives rise thereto as fraudulent per se.[36] But the fact alone that a trustee is without authority to bind the estate will not, of itself, render him personally liable upon executory contracts where no such liability was intended by either party.[37] A trustee who, in a settlement out of court, allows illegal credits upon the account of his predecessor, will be liable to the shareholders for the amount so allowed.[38] So a trustee who pays out trust funds pursuant to the court's direction outside the scope of any subject-matter of such court's jurisdiction is personally responsible therefor.[39] A trustee who has converted trust funds to his own use, by investing them in his own name, may be held for the conversion, the investment proving unprofitable. It is not a sufficient excuse for purchasing in his own name that he might want to sell without the delay of an application to the court.[40]

One of the leading cases in which a trustee was held liable for the debts of the trust is Connally v. Lyons;[41] herein the

[35] Philip Carey Co. v. Pingree, 223 Mass. 352, 111 N. E. 857.

[36] Costello v. Costello, 209 N. Y. 252, 103 N. E. 148.

[37] Bried v. Mintrup, Supra.

[38] Ashley v. Holman, 44 S. C. 145, 21 S. E. 624.

[39] Cowie v. Strohmeyer, 150 Wis. 401, 136 N. W. 956.

[40] White v. Sherman, 163 Ill. 589, 48 N. E. 128.

[41] 82 Tex. 664, 18 S. W. 799, 27 Am. St. Rep. 935.

trustee made no effort to limit his liability to the trust estate or to the business of the trust. The plaintiff Lyons knew that the business was being carried on as a trust, but that in itself was not sufficient to enable the trustee to escape liability. It is necessary for the trustee, not only to have his liability limited in the trust agreement at the time of his appointment, but also to bring this home to the people with whom he contracts; and if that had been done in this case, the question of personal liability of the trustee would have been entirely eliminated. The facts and the opinion in the case are summarized as follows:

Action by W. H. Lyons & Company against Nathan Connally to recover the value of merchandise; judgment for the plaintiffs; defendant appeals; affirmed. On February 25, 1875, M. A. T. Connally executed and delivered a written instrument conveying her entire mercantile business to her father, C. P. Connally, in trust, to conduct the business until the grantor's youngest brother would, if living, be 25 years of age, when the property, with its increase, was to be divided among the beneficiaries. The grantor reserved to herself a ninth undivided interest, with power to draw it out at will, and gave to her father one-ninth absolutely, and to each of her brothers one-ninth; and the deed provided that the father might, at his option, pay to any one of the brothers the share of such brother. The father was to receive $1000 per annum for his services; none of the brothers were to have power to force a settlement until the expiration of the trust.

On March 24, 1882—C. P. Connally, the father, having died previously—the district court of Hopkins County appointed defendant Nathan Connally, who was one of the beneficiaries, as trustee. Defendant accepted the appointment and continued to operate the business in the name of Connally & Company

under which it had been carried on by the prior trustee, until January 20, 1886, when the property was attached. A few days before the attachment, defendant, acting for Connally & Company, drew from the bank $4,286, and it does not appear what disposition was made thereof.

116—*Partnership Liability Not Applicable to Beneficiaries.*

The decision, in the main, follows: Appellant's first, second and eighth assignments of error raise the question of parties as presented by his exceptions to the petition, but only on the ground that the persons who were claimed to be necessary parties were such as beneficiaries in a trust, and not as partners. If Connally & Company were a partnership, all of the partners would be necessary parties to an action of debt for the price of the goods. It is not necessary to consider whether they would be in a suit for the value of the goods, if the possession thereof was obtained by the fraudulent representations of the defendant, because the court arrived at no conclusion that the goods were fraudulently obtained. But if Connally & Company was a trust estate, managed by the defendant as trustee, it is clear that the beneficiaries of the trust would not be necessary parties to a suit for a debt incurred in the management of the trust if the trustee should be personally liable therefor; and this question will be considered under another assignment raising that question. Mere participation in profits does not constitute a partnership, although there should be a contract from which they were derived.[42] There was no contract of partnership in this case. The defendant, Nathan Connally, acted as trustee under an appointment from the court, and had the entire control and sole management of the business. There was no right of

[42] Buzard v. Bank, 67 Tex. 89, 2 S. W. Rep. 54.

control whatever reserved in the instrument executed by M. A. T. Connally to her father, C. P. Connally, as trustee, either for herself or for the beneficiaries as such. A test of partnership is the right of control over the property or profits, or to make disposition thereof.[48] There was no right whatever in the brothers of the grantor, who were beneficiaries therein, either to control or withdraw their several interests. From the terms of the instrument, the business was to be conducted until the youngest was 25 years of age, or, if he died before that time, to such a time as he would have been 25 if he had lived. We must also infer that at least some of the beneficiaries were minors, and it will not be contended that they could be partners, although the instrument might indicate a partnership. The finding of the court is further strengthened by the fact that there is no instrument of facts brought up with the record, and there may have been proof of other facts to sustain his conclusion that Nathan Connally was the trustee of a trust estate. We think, however, that a proper construction of the instrument alone would lead to the same conclusion. There was no evidence to make the beneficiaries partners by holding out, but such a partner would not be a necessary party.

117—*Mere Knowledge of Creditor Not Sufficient to Exempt Trustee from Personal Liability.*

Appellant's ninth and tenth assignments of error are as follows: The court erred in its conclusions of fact and law in finding the estate of Connally & Co. was a trust estate and Nathan Connally was trustee of same; and finding, further, that goods, wares, and merchandise mentioned in plaintiff's petition were sold and delivered to Connally & Co. by plaintiffs,

[48] 1 Bates, Partn. Sec. 37.

and then rendering judgment against defendant, Nathan Connally, for the debt here sued on. The court erred in its finding of law that defendant, Nathan Connally, would be liable for said debt personally because he failed to make a contract with plaintiff exempting him from said liabilities.

As we are of the opinion that a trust estate was created by the instrument of conveyance from M. A. T. Connally to her father, C. P. Connally, it remains only to consider, under the above assignments, whether or not the trustee, the defendant, was personally liable for the goods purchased by him for the trust estate from plaintiffs. Trustees of a corporate body, with defined powers, are not personally liable, and such has been the recognized rule in this state from the early decisions.[44] But whether or not the trustee of a voluntary association or a trust estate is personally liable has not been before our supreme court in any case that we can find. That such trustees should be held personally liable is reasonable, because they have in their own hands the means wherewith to reimburse themselves, and should not assume a debt for the benefit of an estate of which they have the sole management and control, without prospect of funds for payment thereof. If this principle needed to be enforced by way of illustration, it may be done by the fact that the defendant, a few days before the attachment, withdrew from the bank the deposit of Connally & Company amounting to over $4,000 in cash. In Hill on Trustees (533) the doctrine is broadly stated that "a trustee who carried on any trade with the trust assets for the benefit of the cestuis que trustent, will be responsible to the creditors, not only to the extent of the trust assets, but also with the whole of his own property; and

[44] Traynham v. Jackson, 15 Tex. 170, 65 A. D. 152; Dyer v. Sullivan, 18 Tex. 771; College v. McHugh, 39 Tex. 348; Snyder v. Wiley, 59 Tex. 449.

he may be made bankrupt and proceeded against in the same manner as any other trader; it is immaterial that the trade is carried on by him in consequence of an express direction in the trust instrument, although the trust property will doubtless be primarily liable to the creditors, and will be first applied so far as it will go in discharge of the liabilities." Purchases by trustees, when made in obedience to the trust, impose upon them a personal liability. The seller must look to them for payment, and they must look to the trust estate for reimbursement.[45]

Although the plaintiffs knew that the defendant was conducting the mercantile business of which he had the control and management as trustee for the benefit of the persons mentioned in the conveyance from M. A. T. Connally to her father, C. P. Connally, and charged the goods when sold to Connally & Company, the defendant was nevertheless personally liable to the plaintiffs for the price of the goods, and it was not necessary first to establish the account as a debt against the trust estate. This rule is not only in accordance with the authorities, but is a salutary rule in the interest of common justice. Since the trustee was personally liable, it was not necessary that the beneficiaries should be made parties to the suit. The account sued on was not barred by limitation when plaintiff's first amended original petition was filed, so it is necessary to inquire whether or not the amended petition set up a new cause of action. It appears from the petition that the account was not

[45] Taylor v. Davis' Adm'x., 110 U. S. 330, 4 Sup. Ct. Rep. 147; Hewitt v. Phelps, 105 U. S. 400; Sanford v. Howard, 29 Ala. 684; New v. Nicoll, 73 N. Y. 127, 29 Am. Rep. 111.

This doctrine is also recognized in Mason v. Pomeroy (Mass.), 24 N. E. 202 and Association v. McAllister (Mass.), 26 N. E. 862. The Alabama case is where a guardian was held liable; it is also reported in 68 Amer. Dec. 101, which see for note as to executors and administrators.

due for a time after the date of the items from which two years would extend past the filing of the amended petition. So the demurrer setting up limitation was properly overruled by the court. We conclude that there was no error in the judgment of the court below, and that the same should be affirmed.

118—*For Mismanagement.*

Where duties are conferred by an express trust, its terms must be conformed to by the trustees, and for failure to do so they are liable for any loss to the shareholders.[46] So if trustees are guilty of mismanagement or maladministration, and the beneficiaries of the trust are justified in suing them to recover or secure the trust estate in their hands, the attorney's fees of the trustees for resisting such an action will not be allowed out of the trust estate.[47] It is the duty of a trustee to look after trust property, and where he causes the trust estate to be repaired improperly and negligently, he is not shielded from personal liability by reason of his trusteeship; his negligence is his individual misfeasance.[48] An instrument creating a trust may direct precisely that funds be invested in certain bonds or securities; if the investment is made otherwise, the amount so invested should be surcharged to the trustee.[49]

Where a trustee refuses to receive a dividend from an insolvent debtor of the trust estate, he will be treated as if he had in fact received and failed to invest the money.[50] If money is deposited in the bank in such a manner that it is not under

[46] Klugh v. Seminole Securities Co., 103 S. C. 120, 87 S. E. 645.

[47] Melson v. Travis, 133 Ga. 710, 66 South. 936.

[48] Trani v. Gerard, 181 App. Div. 387, 168 N. Y. Sup. 808.

[49] Internatl. Trust Co. v. Preston (Wyo.), 156 Pac. 1128.

[50] Backus v. Crane, 87 N. J. Eq. 229, 100 Atl. 900.

the trustee's own exclusive control—as where money is deposited so that it can be drawn without the concurrence of another person—it is at the peril of the trustee, and he is liable for any loss occasioned thereby.[51] For the rule is that where a loss has occurred which must fall upon one of two persons, it must be borne by him whose act occasioned it.[52]

119—*For Acts of Others.*

The trustees of a trust estate operating as a business company are individually the masters of the servants engaged therein, and may not absolve themselves of personal liability for breach of masters' duty toward such servants.[53] For where trustees appoint an agent to collect rents from trust property, the trustees are liable for collections made.[54] Just the same as the trustees are held responsible for property intrusted to an agent and he appropriates the property to his own use.[55] Trustees are also liable for their attorney's misappropriation of the trust funds where they permit him to collect money at various times during a period of years without making an effort to recover any of the sums, and retain the attorney after they should have known of his misappropriation of the trust funds.[56] The acceptance of a trusteeship involves a duty, and where one of two trustees surrenders to his co-trustee the entire control of all the personalty and expenditures, and makes no attempt to verify his associate's accounts, he is liable for his associate's default; for while as a general rule a trustee is

[51] Boehmer v. Silvestone, 95 Ore. 154, 186 Pac. 26.

[52] Cochran v. Richmond & A. R. Co., 91 Va. 339, 21 S. E. 664.

[53] Fisheries Co. v. McCoy (Tex. Civ. App.), 202 S. W. 343.

[54] Dillivan v. German Savings Bank (Ia.), 124 N. W. 350.

[55] Boehmer v. Silvestone, Supra.

[56] McRoberts v. Carmeal (Ky.), 44 S. W. 442.

responsible only for his own acts or defaults, yet, if by any affirmative act or any omission of duty he facilitates a breach of trust, he is liable.[57] A trustee who permits his cotrustee to use funds of the estate, giving his note for the amount, is accountable to the trust for the amount so used.[58] Where trustees are not diligent in the protection and care of the trust property, they may be liable for embezzlement of trust funds by a third trustee.[59]

120—*For Negligence.*

Where a trustee is negligent or unfaithful, he is responsible for the amount the property coming into his hands ought to yield,[60] for when trustees accept the office they should bear in mind that the law knows no such person as a passive trustee and that they cannot sleep upon their trust. If such trustee remains quiet for any reason and suffers some other to do all the business, he is as answerable for the money as if he had conducted the business. If a loss occurs from any want of attention, care or diligence in him after his acceptance, he may be held responsible for not taking such action as was called for. A trustee will be held responsible for failure to do that which he ought to do, as well as for his acts of positive misconduct. He must respond in damages for any neglect of duty, express or implied.[61] The rule is that trust estates cannot be mulcted for personal injuries sustained through the negligence of the trustees in relation thereto.[62] Where a trustee learns

[57] Caldwell v. Graham, 115 Md. 122, 80 Atl. 839.

[58] In re Cozzens' Estate, 15 N. Y. Sup. 771.

[59] In re Graham Estate, 218 Pa. 357, 67 Atl. 462.

[60] Candelaria v. Miera, 18 N. M. 107, 134 Pac. 829.

[61] Holmes v. McDonald, 226 Ill. 169, 80 N. E. 714.

[62] Norling v. Allee, 10 N. Y. Sup. 97.

of any matters relating to mismanagement or misapplication of trust funds by his co-trustee, his failure to take steps to prevent the same renders him liable for the resulting loss; also, if through the negligence of a trustee, his cotrustee is permitted to convert the trust funds to his own use, the failure to exercise diligence renders him liable for the loss.[63] A trustee may be negligent in seeking to restore trust property which his co-trustee without his concurrence, may have sold and not accounted for in full to the estate, but this would not deprive the estate of its right to receive the full proceeds of the sale.[64]

There is no special rule prohibiting the investment of trust funds in the stocks and bonds of private corporations, and in case of loss, the question of liability depends upon whether the trustee acted with fidelity and with the care and diligence of a prudent man.[65] A trustee will not be exonerated from liability for a wrongful diversion of the funds of his trust where the declaration of trust provides that he should be liable only for the result of his own gross negligence or bad faith, or where he is guilty of wilful or intentional breach of trust committed by acting plainly beyond his powers.[66]

121—*For Misappropriation.*

Where a trustee misappropriates trust funds or property, he is liable, and the property or funds so misappropriated may be impressed with a preferential lien in favor of the beneficiaries, though the money of the trust estate was commingled with

[63] In re Adams' Estate, 221 Pa. 77, 70 Atl. 436.

[64] Fritz v. City Trust Co., 72 App. Div. 532, 76 N. Y. Sup. 625.

[65] Scoville v. Brock, 81 Vt. 405, 70 Atl. 1014.

[66] Digney v. Blanchard, 226 Mass. 335, 115 N. E. 424; In re Mallon's Estate, 110 App. Div. N. Y. 61, 97 N. Y. Sup. 23.

other money of the trustee or of his estate; it is the duty of the substituted trustee to assert a preferential lien on the general assets of the trustees or of his estate for the benefit of the beneficiaries.[67] That a trustee reposes great confidence in his co-trustee does not excuse his failure to protect the funds against a misappropriation of them by such co-trustee, nor does the illness of a trustee before the default of his co-trustee excuse his failure to guard the interests of the beneficiaries where he had knowledge before his illness of the acts of his co-trustee which should have put him on guard against the subsequent misappropriation.[68]

It is no excuse, nor is it a defense to a proceeding against the trustee and his surety for misappropriation of the funds, that the trustor was insane at the time the trust was created.[69] In addition to the liability of trustees for misappropriation of trust funds, third parties may be held liable where it is shown that the third party knowingly participated in the breach of trust.[70]

122—*Extent of Trustees' Liability.*

If a trustee fails to use ordinary care in making trust property produce income, he is liable for the reasonable income value thereof; where he uses ordinary and reasonable care in managing the trust fund, he is only to be charged with the actual receipts less proper expenditures.[71] He is also charge-

[67] Cotting v. Berry, 50 Colo. 217, 114 Pac. 641.

[68] In re Adams' Estate, 221 Pa. 77, 70 Atl. 436.

[69] Wright v. Clark, 81 Miss. 527, 142 N. Y. Sup. 812; Central Trust Co. v. Gaffney, 157 App. Div. 501, 142 N. Y. Sup. 902.

[70] Perry v. Oerman & Blaebaum, 66 W. Va. 566, 60 S. E. 604; Swift v. Williams, 68 Md. 236, 11 Atl. 835.

[71] Dillivan v. German Sav. Bank (Ia.), 124 N. W. 350.

able with interest on sums he may retain for himself which he should pay over to the beneficiaries,[73] and where a trustee fails to pay over to his successor as trustee all of the trust fund received from his predecessor, he is liable on his bond for the deficit to his successor.[73] The rule is that all profits derived from the trust property become a part of the trust, and a trustee is liable for secret profits even though the transaction from which they arise benefits his trust, the beneficiary is entitled not only to a part, but to all, of the benefits.[74] Where a trustee is negligent in selling stock and there is a loss, he should be surcharged with the difference between the market value of the stock at the time he should have sold it, and the lower price at which it subsequently sold.[75] Where two trustees have been guilty of a breach of trust, the court may determine the order in which they shall stand answerable for the loss by making one primarily liable, and the other secondarily;[76] or the loss may be divided between the trustees guilty of neglect or breach of trust.[77]

123—*Limitation of Trustees' Liability.*

Where the trustees' liability is sought to be limited to the trust property, the trust instrument should especially provide against personal liability; this provision of limited liability should be embodied in all contracts and instruments, and in all dealings with third parties by the trustees.[78] Under certain cir-

[73] In re Bosler's Estate, 161 Pa. 457, 29 Atl. 57.

[73] Bogard v. Planters' Bank & Trust Co. (Ky.), 112 S. W. 872.

[74] Keely v. Black, 90 N. J. Eq. 439, 107 Atl. 825.

[75] Babbit v. Fidelity Trust Co., 72 N. J. Eq. 745, 66 Atl. 1076.

[76] McCartin v. Administrator of Traphagen, 43 N. J. Eq. 323, 11 Atl. 156.

[77] Fisheries Co. v. McCoy (Tex. Civ. App.), 202 S. W. 343.

[78] Hussey v. Arnold, 185 Mass. 202, 70 N. E. 87.

cumstances, trustees and members of an incorporated association may limit their liability as to some torts; and in special instances even relieve the trust estate, since it is not contrary to public policy to stipulate against liability for negligence except where relation of master and servant or passenger and carrier exists.[79]

The principle of law under which trustees limit their liability is thoroughly discussed in the case of Shoe and Leather National Bank v. Dix.[80] There the trustees as such, signed a note; they expressly stipulated against personal liability. In a suit to subject them personally to the amount of the note, the court held that inasmuch as they had limited their liability, it was not within the power of the court to change the trust liability to a personal one. This is one of the leading cases on the subject of limited liability. The note in question was set out in this language:

February 16, 1871. $53,000. For value received, we as trustees, but not individually, promise to pay to the Boston Water Power Company or order, the sum of fifty-three thousand dollars in five years from this date, with interest to be paid semi-annually at the rate of seven per centum per annum during said term, and for such further time as said principal sum or any part thereof shall remain unpaid.

Signed in Presence of P. H. Sears.

GEO. P. SANGER,
JOSEPH DIX,
R. A. BALLOU,
Trustees.

This note was secured by a mortgage of real estate in Boston;

[79] Fisheries Co. v. McCoy, Supra.

[80] 123 Mass. 148, 25 Am. Rep. 49.

the proceedings and findings of the court are substantially as follows:

On February 16, 1871, the association, through its said trustees, caused a purchase of property from the Boston Water Power Company to be effected and the conveyance to be made to the defendants, "as they are trustees for the Brookline Avenue Associates as hereinafter set forth." "To have and to hold the granted premises, with all the privileges, easements and appurtenances thereto belonging, to the said Sanger, Dix and Ballou, as joint tenants and not as tenants in common, and to their heirs and assigns and to the survivor of them and his heirs and assigns forever, in trust nevertheless for the Brookline Avenue Associates for the following purposes: to take hold, mortgage, lease, manage and improve the same according to the exercise of their best discretion, with full power in the trustees or trustee for the time being in the exercise of such discretion, to sell at public or private sale any portion or the whole of the real estate hereby conveyed, and to make, execute and deliver good and sufficient deeds to convey the same in fee simple free from the trusts hereby created."

At the same time with the execution and delivery of the deed, a mortgage back to the Boston Water Power Company in part payment of the purchase money was executed by the defendants, and the note secured thereby—being the note in question—given, which was indorsed to the plaintiff. The mortgage was never assigned to the plaintiff, having been foreclosed by sale on November 4, 1875.

If, upon these facts, the defendants were liable, they were to be defaulted, judgment to be ordered against the defendant Dix for a sum stated, to be proved against his estate in bankruptcy, but no execution to issue against him personally and against the defendant Sanger; otherwise, judgment was to be

ordered for the defendants. The court, in passing on the facts above, said that the question whether the defendants have made themselves personally responsible must be determined by the terms of the note itself. In determining the proper interpretation of any written contract, the court will give full effect to all the terms in which it is expressed. Those terms will not be modified by extrinsic evidence tending to show that the real intention of the parties was something different from what the language imports. They will be taken in their plain, ordinary and popular sense, except where it may be qualified by some special usage, or where the context evidently shows that the parties in some particular case had a different intent. It is no part of the business of the court to make or alter a contract for the parties. Even if it be found that the contract according to its true meaning, has no legal validity or fails to become operative, it is not for the court, in order to give it operation, to suppose a meaning which the parties have not expressed, and which it is certain they did not entertain. It must be assumed that all the language used in the contract was selected with some purpose and is to be of some effect. If a party, therefore, in a contract into which he voluntarily enters, and not in the execution of any official trust or duty, makes it an express stipulation that he is acting for somebody else, and is in no event to be personally liable, he certainly cannot be rendered so by law.[81] In a question as to the meaning of a contract, the want of apt words to create a personal responsibility is not to be supplied by the alteration or enlargement of its terms.

In applying these familiar and elementary rules of construction to the case now before us, we find that the defendants promised "as trustees but not individually." The construction

[81] Sedgwick, J., in Sumner v. Williams, 8 Mass. 162, 184.

contended for by the plaintiffs would require us to strike out the words "but not individually;" although in so doing we should not only alter the contract, but should impose upon them a liability which apparently they took special pains to avoid.

It is to be borne in mind that this was not a case of agents acting for an undisclosed or unknown principal, and is, therefore, readily distinguishable from Winsor v. Griggs,[82] and cases of that class. Neither was it an attempt by the defendants to bind property over which they had no legal control. By the terms of the deed they had power to mortgage, lease and manage the property at their discretion, but for the benefit and on the account of the equitable owners, namely, the members of the Brookline Avenue Association. In this respect the case differs from Thacher v. Dinsmore,[83] and other cases of that class, in which a party promising "as guardian," etc., was held to have made himself personally liable.

Neither can it be said that the term "trustees" was used as a mere description of the general relation or office which the person signing the paper holds to another person or to a corporation, without indicating that the particular signature is made in the execution of the office and agency. In this respect the case differs from Tucker Manuf. Co. v. Fairbanks.[84] It often has happened that an agent for another person, or the treasurer of a corporation, has made himself personally responsible by the form of words in which he has expressed himself in a written contract, when he may have intended to bind his principal only. Cases in which this question has been raised have often been before this and other courts, and the authorities have recently been collected and reviewed in several of our

[82] 5 Cush. 210.
[83] 5 Mass. 299. Also Forster v. Fuller, 6 Mass. 58.
[84] 98 Mass. 101.

own decisions.[85] But we believe no case can be found in which a promise "as trustee," etc., accompanied with an express disclaimer of personal liability, would fail to exempt him.

It is contended that if these defendants are not liable upon the contract as a note, then nobody is liable. Even if such were the fact, it would not be in the power of the court, as we have already seen, to alter the contract for the purpose of giving it validity. In deciding whether the defendants have or have not bound themselves, we need not decide whether they have or have not bound their principals.[86] But, even if the written contract should fail of taking effect as a negotiable note, it might still be operative as an acknowledgment of unpaid debt which the mortgage was intended to secure. It may be that this was all that the original parties intended, or supposed to be material. They may have considered the mortgage sufficient security without the personal responsibility of the trustees.

Our conclusion, therefore, is that, without proof that the defendants, as trustees, have funds of the association in their hands applicable to this debt, no action can be maintained against them. No evidence to that effect having been offered, we must order judgment for the defendants.

124—*Non-Liability.*

If a trustee contracting for the benefit of a trust wants to protect himself from individual liability on a contract, he must stipulate that he is not to be responsible personally, and that the other party is to look solely to the trust estate.[87] Trustees cannot be held personally liable on a contract expressly restricting liability to the trust fund, which it was within their au-

[85] Slawson v. Loring, 5 Allen 340; Barlow v. Lee Congregational Society, 8 Allen 460; Tucker Manuf. Co. v. Fairbanks, 98 Mass. 101.

[86] Abbey v. Chase, 6 Cush. 54.

[87] Taylor v. Davis, 110 U. S. 335, 4 Sup. Ct. 147, 28 L. Ed. 163.

thority to make, because they failed properly to execute the contract;[88] nor is a minority trustee personally liable on a contract which he did not personally make, merely because a majority of the trustees authorized it.[89] A trustee should not be surcharged for a loss arising from a mere error of judgment when not guilty of any willful neglect or fraud.[90] A trustee will not be liable for tax penalties which accrue against the trust estate while he is endeavoring in good faith to protect it from liability for the taxes;[91] and a claim for expenses incurred in making an examination of the affairs of a trustee after it is discovered that he has defaulted, is not a charge for which the trustee's surety should be made to answer.[92] Nor should a trustee be held accountable for money of the estate appropriated by a cotrustee to his own use, without the former's knowledge.[93]

Trustees are not responsible for the acts of a deceased trustee unless they have expressly agreed to be responsible; e. g., if a bond for faithful performance is to be considered such an agreement, their liability must be fixed at least by suit on the bond, and not by suit on purely equitable grounds.[94] Nor are the trustees liable for the proceeds of sales which come directly into the cotrustees' hands without coming into their possession or control, nor for rents of portions of the lands collected by their agent and by him paid over without their direction or knowledge to the cotrustee by whom they were converted.[95]

[88] Rand v. Farquhar, 226 Mass. 91, 115 N. E. 286.

[89] Markel v. Peck, 168 Mo. App. 358, 151 S. W. 772.

[90] Appeal of Bailey (Pa.), 5 Atl. 49.

[91] Denvir v. Park, 169 Mo. App. 335, 152 S. W. 604.

[92] U. S. Fid. & Guar. Co. v. Douglas' Trustee, 134 Ky. 374, 120 S. W. 328.

[93] In re Cozzens' Estate, 15 N. Y. Sup. 771.

[94] Laurel Co. Ct. v. Trustees of Laurel Co. Seminary, 93 Ky. 379, 20 S. W. 258.

CHAPTER XII.

COMPENSATION OF TRUSTEES.

125—*Fixed by Instrument.*

Where compensation of a trustee is fixed by the deed of trust, the trust being of great magnitude, he will not be required to furnish free a place in which to give his attention to the business, where his clerk can work and where the mass of books and papers belonging to the trust estate can be kept.[96] A substituted trustee, with all the powers and duties of the original trustee, is entitled to the same compensation as the original trustee, as provided for in the declaration of trust. A trust instrument may provide that each trustee receive a stipulated compensation per month for a period of years—the duration of the trust; their right to such compensation is limited to the specified period and for any further services by reason of the trust being prolonged, their compensation must rest upon an award of the court on quantum meruit.[97] Where a trust is to continue for a certain number of years—when distribution is to take place—and it directs that the managing trustee shall receive a specified amount annually for his services, the provision for such trustee will last only the duration of the trust; after such period, the managing trustee is entitled to reasonable compensation to be fixed by the court.[98] The general rule is that a trustee is entitled to have his commission paid out of the

[95] Purdy v. Lynch, 145 N. Y. 462, 40 N. E. 232.

[96] Southern Ry. Co. v. Glenn's Adm'r., 98 Va. 309, 36 S. E. 395.

[97] In re Hanson's Estate, 159 Cal. 401, 114 Pac. 810.

[98] Muhlke v. Tiedemann, 280 Ill. 534, 117 N. E. 708.

principal of the trust fund where there have been no earnings, but where there are earnings the cost of managing and preserving the trust estate should be paid first out of the income.[99]

126—*Reasonable.*

Where the trust instrument does not provide for compensation, it is a general principle in the administration of trusts that the trustee shall have reasonable compensation.[100] Where the instrument creating a trust does not declare that the trustee shall be compensated for the services rendered in executing the trust, the court may allow him a reasonable compensation therefor.[1] A trustee may find it necessary to employ brokers to sell real estate and distribute the proceeds, and if the sum paid out by him is reasonable compensation he should be allowed therefor.[2] A trustee may be allowed reasonable compensation for ordinary services rendered in the discharge of the trust; semble, he may be allowed extra compensation for extraordinary services required of him in the discharge of such trust.[3] Where a trustee through error of judgment in an honest endeavor to protect the estate from a charge for taxes, permits the taxes to lapse and penalties to accrue, he does not thereby forfeit his right to compensation as trustee.[4]

[99] Whittingham v. Schoenfield's Trustee (Ky.), 68 S. W. 116; Catt v. Wm. Knabe & Co. Mfg. Co., 93 Va. 736, 26 S. E. 246.

[100] Hanscom v. Malden & Melrose Gas Lt. Co., 234 Mass. 379, 125 N. E. 626.

[1] Patrick v. Patrick, 135 Ky. 307, 122 S. W. 159.

[2] Rutherford v. Ott, 37 Cal. App. 47, 173 Pac. 490.

[3] Turnbull v. Pomeroy, 140 Mass. 117, 6 N. E. 15; Jarrett v. Johnson, 216 Ill. 212, 74 N. E. 756; Thomas v. Thomas, 97 Miss. 697, 53 So. 630.

[4] Denvir v. Park, 169 Mo. App. 335, 152 S. W. 604.

127—*Excessive.*

While trustees are allowed reasonable compensation for services rendered, the question of excessive compensation is governed entirely by the kind and character of services rendered in behalf of the shareholder and the trust property. A certain compensation may be allowed the trustees for the duration of the trust whose funds are well invested wherein no vexatious questions are involved in its administration; this cannot be said to be inadequate if a deceased trustee, during his lifetime, received such compensation without suggestion of dissatisfaction.[5] A fee for services as trustee may be found excessive if it appears that his accounting, though involving large sums, is comparatively short and simple.[6] Where trustees contract to render their services for a certain sum, an extra allowance may be deemed improper if the services so rendered do not involve more time than was originally contemplated and there is no great responsibility requiring extraordinary compensation;[7] but where trustees, in carrying out the trust, perform services not contemplated originally, they may receive extra compensation; if this extra is found excessive, it should be reduced.[8]

128—*Commission to Trustees.*

Where no other provision has been made for the payment of the trustees' services, they may be paid a commission on the amount of business transacted; or compensation may be paid on a reasonable per cent, using the total amount of the trust property as a basis; or the trustees' commission may be based

[5] Kilpatrick v. Robert, 278 Mo. 257, 212 S. W. 884.

[6] Marks v. Semple, 111 Ala. 637, 20 So. 791.

[7] Easton v. Houston & T. C. Ry. Co., 40 Fed. 189.

[8] Rackemann v. Tilton, 236 Ill. 49, 86 N. E. 168.

upon a percentage of the income; but compensation for services performed and liability incurred should be only fair, for that is all that the trustees are entitled to.[9] The general rule seems to be that an allowance of five per cent commission on the income of the trust estate is not excessive where the wisdom of the trustee's conversion of the securities is not questioned, his re-investments are sound and made without unreasonable delay, and he promptly collects the interest.[10] Where no extraordinary services are rendered by a trustee, he will not be entitled to any compensation in excess of the regular commission.[11] However, allowance may be made to a trustee for extra and special services for which the rule seems to be based and apportioned according to the nature and responsibility of the trust, and the length, fidelity, and success of the service.[12]

129—*Allowed by Court.*

The chancery court, in appointing a proper trustee, may award fairly adequate compensation, notwithstanding the provisions of the trust instrument;[13] and where a trustee is entitled to commission and anything in addition is demanded, it must be allowed by the court.[14] Where trustees in their first account credit themselves with compensation for a certain period and it is allowed by the court, such allowance is usually conclusive.[15] Courts of chancery, in the exercise of their discre-

[9] Kilpatrick v. Robert, 278 Mo. 257, 212 S. W. 884.

[10] In re Bosler's Estate, 161 Pa. 457, 29 Atl. 57; Wilder v. Hast (Ky.), 96 S. W. 1106.

[11] Doom v. Howard (Ky.), 64 S. W. 469.

[12] Offutt v. Divine's Ex'r. (Ky.), 53 S. W. 816; In re Van Riper's Estate, 90 N. J. Eq. 217, 107 Atl. 55.

[13] In re Battin, 89 N. J. Eq. 144, 104 Atl. 434.

[14] Sartor v. Newberry Land & Security Co., 104 S. C. 184, 88 S. E. 467.

[15] In Re Hanson's Estate, 159 Cal. 401, 114 Pac. 810.

tion, may make an allowance of five per cent on the income and one and one-half per cent on the principal of the trust property for the trustee's compensation.[16]

130—*Forfeiture of Compensation.*

A trustee guilty of fraud or misconduct in the maangement of the estate is not entitled to compensation;[17] and where trustees are guilty of a breach of trust, one of them converting trust property and the other acquiescing, all compensation may be denied.[18] A trustee who repudiates the trust and claims the trust estate as his own property, involving it in litigation; who refuses to pay over to the beneficiary the income from the trust; who files an account only when compelled to do so by law, and in such account places many unjustifiable charges, will be allowed neither commissions nor expenses.[19] Where trustees keep no books—successive corrected statements being required—and an accounting is reached only by compulsion, they are not entitled either to commissions or counsel fees;[20] for the rule is that trustees who have been grossly negligent in the discharge of their duties and who failed to keep an account, are not entitled to commissions.[21] Commissions are a compensation for faithful discharge of duty; when trustees violate their duty and commingle money belonging to their beneficiaries with their own and use part or all of it for their own private purposes, they are not entitled to commissions.[22]

16 Central Trust Co. v. Johnson (Ky.), 74 S. W. 663.

17 Comingor v. Louisville Trust Co., 128 Ky. 697, 108 S. W. 950.

18 Harvey v. Schwettman (Mo. App.), 180 S. W. 413.

19 Hanna v. Clark, 204 Pa. 145, 53 Atl. 757.

20 In re Reich's Estate, 230 Pa. 55, 79 Atl. 151.

21 Ward v. Shire (Ky.), 65 S. W. 8.

22 Hoboken Trust Co. v. Norton, 90 N. J. Eq. 314, 107 Atl. 67.

131—*Reimbursement of Trustees.*

Where a trustee uses his own money for the purposes of the trust, he is entitled to reimbursement;[23] and this reimbursement may be made out of money in his hands which belongs to the trust.[24] Where a trustee, in executing his trust, makes advances proper to be made, he is not only entitled to be reimbursed, but also has a lien on the trust estate for repayment which is prior to any encumbrance imposed thereon by the beneficiary.[25] A trustee's right to reimbursement for reasonable expenditures in the employment of counsel in the interest of the estate rests upon the fact that he, and not the trust estate, is responsible to the attorney for his fees, and not upon the right of the trustee to be subrogated to any rights of the attorney against the estate.[26] But, when a trustee brings adversary proceedings to take trust property from the possession of those entitled to it in order that he may distribute it to those entitled adversely, and fails in his purpose, he cannot demand reimbursement of his expenses from the trust fund, or contribution from those whose property he has sought to misappropriate.[27]

132—*Expenses of Trustees in General.*

A trust fund must bear the necessary expenses of its administration, and one who conducts a litigation for the benefit of such fund must be protected in the distribution of it for the

[23] American Bonding Co. v. State, 40 Ind. App. 559, 82 N. E. 548.

[24] Oellien v. Galt, 150 Mo. App. 537, 131 S. W. 158.

[25] Turton v. Grant, 86 N. J. Eq. 191, 96 Atl. 993; Patterson v. Northern Trust Co., 286 Ill. 564, 122 N. E. 58; Jessup v. Smith, 223 N. Y. 203, 119 N. E. 403.

[26] Denvir v. Park, 169 Mo. App. 335, 152 S. W. 604.

[27] Hobbs v. McLean, 117 U. S. 567; Sommerset Ry. v. Pierce, 98 Me. 528, 57 Atl. 888.

expenses incurred by him in the faithful performance of his duty.[28] Where one of many persons having a common interest in a trust fund, at his own expense, takes proceedings to save it from distribution and restore it to the purposes of the trust, he is entitled to reimbursement, either out of the fund or by proportional contribution from those who accept the benefits of his efforts.[29] On the enforcement of a trust which the trustee attempts wrongfully to carry out or seeks to repudiate, the plaintiff is entitled to his costs and disbursements;[30] but where a trustee brings on litigation in violation of his duty as trustee, the cost of the litigation should be taxed against him personally.[31] As one of the duties of their office, the trustees are to render from time to time an accounting; when this is done the trust estate is charged with the cost of the accounting; but when the trustees fail to account, and expenses are incurred by reason of their failure, then they may be compelled to pay the costs personally.[32]

133—*Attorney's Fees.*

A trustee is entitled to have his proper and necessary expenses incurred in the execution of his trust, out of the trust fund; attorney's fees are proper expenses whenever it is needed to employ one in the management, care, or protection of the

[28] Las Vegas Ry. & Power Co. v. Trust Co. of St. L. Co., 17 N. M. 286, 126 Pac. 1009; Somerset Ry. v. Pierce, Supra; Hobbs v. McLean, Supra.

[29] Las Vegas Ry. Co. v. Trust Co. of St. L. Co., Supra; Somerset Ry. v. Pierce, Supra; Hobbs v. McLean, Supra.

[30] Royal v. Royal, 30 Ore. 448, 47 Pac. 828.

[31] Wiegand v. Woerner, 155 Mo. App. 227, 134 S. W. 596.

[32] McCloskey v. Bowden, 82 N. J. Eq. 410, 89 Atl. 528.

trust estate.[33] Trustees, who in good faith engage counsel to aid in the execution of their trust, are entitled to pay them out of the trust fund,[34] and they may also be reimbursed from the trust for expenses incurred in that behalf.[35] Where a trust by its terms is not to terminate until a certain time, and proceedings are brought before that time to terminate it, the trustees are entitled to an allowance of attorney's fees in resisting the proceedings.[36] Where the creator of a trust endeavors to repudiate it by legal action, and it becomes necessary for the trustee to employ counsel to protect same, the trustee is entitled to have his reasonable counsel fees, costs, and necessary expenses paid out of the trust estate.[37] Where a trustee employs an attorney to perform services beneficial to the trust, but is unable to pay him, such attorney may sue to charge the estate for his services.[38]

[33] Burney v. Atkinson Tenn. Ch., 54 S. W. 998; Berry v. Stigall, 125 Mo. App. 264, 102 S. W. 585; Fox v. Fox, 250 Ill. 384, 95 N. E. 498; Taylor v. Denny, 118 Md. 124, 84 Atl. 369.

[34] Cochran v. Richmond A. R. Co., 91 Va. 339, 21 S. E. 664.

[35] Hummel's Appeal (Pa.), 5 Atl. 669.

[36] In re Hanson's Estate, 159 Cal. 401, 114 Pac. 810.

[37] Bay Biscayne Co. v. Baile, 73 Fla. 1120, 75 So. 860.

[38] Jessup v. Smith, 223 N. Y. 203, 119 N. E. 403.

CHAPTER XIII.

REMOVAL OF TRUSTEES.

134—*Jurisdiction.*

A court of equity has inherent jurisdiction to remove a trustee, independent of statutory provisions, for the good cause shown;[39] and in addition to the court's power to remove a trustee, it may appoint another in his stead whenever there exists a state of mutual ill feeling, based on misconduct or growing out of his misbehavior, between him and the beneficiaries, and where his continuance in office would be detrimental to the execution of the trust, though there be no dishonesty.[40] But once a trustee is appointed by the court and he qualifies and accepts the trust, such court has no inherent power as a court of equity to revoke the appointment, remove the trustee and appoint his successor, without cause and without notice to him.[41] The rule, however, is different when a trustee denies the trust and refuses to perform it. Then a court of equity will appoint a new trustee in his place and the old trustee will not be entitled to retain the property under cover of having an account as trustee, before paying over the net proceeds.[42] Where trust property is located in a certain county and the trust deed is there recorded, the court of that county has jurisdiction of a suit to remove the trustee, no judgment being asked against the trustee in personam.[43]

[39] Maydwell v. Maydwell, 135 Tenn. 1, 185 S. W. 712.

[40] May v. May, 17 Sup. Ct. 824; In re Battin, 89 N. J. Eq. 144, 104 Atl. 434.

[41] Hitch v. Stonebraker's Estate, 125 Mo. 128, 28 S. W. 443; Parker v. Kelley, 166 Fed. 968.

[42] Irvine v. Dunham, 111 U. S. 327.

[43] Wheatcraft v. Wheatcraft, 55 Ind. App. 283, 102 N. E. 42.

135—*Removal of—General.*

In an action for the removal of a trustee, it is not necessary that all the parties signing the indenture of trust act together; if there are grounds for the removal of the trustee, he may be removed at the suit of one of the signers of the indenture.[44] Where trustees have managed the estate with strict fidelity and unusual ability, they will not be discharged because of mere strained relations between them and the shareholders which were probably due to the latter's own misconduct and misjudgment of the trustees;[45] nor will they be removed for a mere failure to make reports;[46] nor because of difference of opinion between them and the shareholders;[47] nor for a discord existing between them and the shareholders, unless it arose out of the misbehavior of the trustees;[48] nor where there is a mere disagreement between the trustees and the shareholders that in itself will not justify the removal of the trustees;[49] for the accepted doctrine is that justifiable cause must exist as grounds for removal.

136—*For Breach of Trust.*

Trustees are fiduciaries, their duty is to the trust and for a breach of this duty, they may be removed. If they are removed, as guilty of a breach of trust, they cannot complain that after their removal the court appointed only one instead of two

[44] Barbour v. Weld, 201 Mass. 513, 87 N. E. 909; Parker v. Kelley, 166 Fed. 968; Jones v. Jones, 8 Misc. Rep. 660, 30 N. Y. Sup. 177.

[45] Anderson v. Kemper, 116 Ky. 339, 76 S. W. 122.

[46] Wilson v. Smoot, 186 Ky. 194, 216 S. W. 129.

[47] In re Price' Estate, 209 Pa. 210, 58 Atl. 280.

[48] Starr v. Wiley, 89 N. J. Eq. 79, 103 Atl. 865.

[49] Wylie v. Bushnell, 277 Ill. 484, 115 N. E. 618.

trustees—as required by the trust instrument.[50] In an action to remove trustees for breach of trust, a report concerning the trust property made by one of the trustees is inadmissible as against the other.[51] If a non-suit is negligently permitted and injury results to the estate, the trustees are guilty of a breach of trust, and should be removed.[52] So is neglect by a trustee to invest moneys in his hands a breach of trust, and is ground for removal.[53] Where one of two trustees takes trust moneys out of the trust estate and treats it as his own, keeping no separate account, he is guilty of a breach of trust and his cotrustee is also guilty of a breach of trust if he acquiesces in such conduct; hence both might properly be removed.[54] The rule is that in all cases the primary consideration is the welfare of the shareholders and the trust property as a whole, and trustees will or will not be removed, according to the necessity for such action, in order to protect the trust estate.[55]

137—*For Neglect or Misuse of Trust Property.*

Equity has power to remove a trustee for neglect of his duty —anything showing a lack of capacity, fidelity, or honesty— but not for any mere error of judgment or mistake as to the true construction of the trust under which he acts.[56] To justify the removal of a trustee, there must be a clear necessity for such action to save the trust property, and the misconduct must be such as to show want of capacity for or fidelity to the trust.[57]

[50] Harvey v. Schwettman (Mo. App.), 180 S. W. 413.

[51] Belding v. Archer, 131 N. C. 287, 42 S. E. 800.

[52] Belding v. Archer, Supra.

[53] Cavender v. Cavender, 114 U. S. 464.

[54] Harvey v. Schwettman, Supra.

[55] Langer v. Fargo Merc. Co. (N. D.), 174 N. W. 90.

[56] Williams v. Nichol, 47 Ark. 254, 1 S. W. 243.

[57] Wiegand v. Woerner, 115 Mo. App. 227, 134 S. W. 596.

But if the acts or omissions of a trustee show a want of reasonable fidelity to his trust, a court of equity will remove him;[58] and so the use of the trust estate by the trustee for his own benefit, or any neglect or mismanagement which impairs or jeopardizes such estate, will furnish sufficient ground for removal.[59] A trustee may be removed for misconduct in an action to cancel the trust, though the trust be a personal one.[60] A proceeding to remove a trustee appointed under a written instrument is a proceeding in personam, and not in rem.[61] The complaint for mismanagement of an estate may allege all of the acts of the trustee in connection therewith from the time he assumed the management of the trust estate.[62]

138—*For Holding a Conflicting Interest.*

As a matter of course a trustee may be a shareholder in the trust property, and if he is also a director of a corporation and tries to influence the trust to its detriment in favor of the corporation, he may be removed, for he occupies antagonistic relations to the trust.[63] Where trustees loan a large part of the funds of the trust to some of their own members, and are about to divert the trust property to their personal advantage and the detriment of the trust, it is proper for the court to remove them and appoint new trustees in their stead.[64] Where a trust estate owns a majority of the stock of a corporation and one of the trustees makes every effort to derive personal advantage from the trust, against the protest of his cotrustee, his

[58] Cavender v. Cavender, Supra.
[59] Wheatcraft v. Wheatcraft, Supra.
[60] Barbour v. Weld, Supra.
[61] Parker v. Kelley, Supra.
[62] Williamson v. Grider, 97 Ark. 588, 135 S. W. 361.
[63] Gartside v. Gartside, 113 Mo. 348, 20 S. W. 669.
[64] State v. Ausmus (Tenn. Ch.), 35 S. W. 1021.

conduct may be considered a breach of trust, for which he may be removed.[65] The personal interest of a trustee coming directly in conflict with his duty to the trust justifies his removal without reference to the question of his good faith.[66]

139—*Death of Trustee—Survivorship.*

At common law several trustees hold as joint tenants;[67] in most of the states, the estate of joint tenancy has been abolished by legislation excepting, however, as applicable to executors and trustees. The rule seems to be that trustees are excepted from the provision of the statute requiring a declaration in the trust instrument that the estate is in joint tenancy; and unless the deed of trust provides otherwise, the trustees hold as joint tenants, and upon the death of one of them, the title devolves upon the survivor—nothing passing to the heirs or personal representatives of the deceased trustee.[68] The above rule is applicable only where there is more than one trustee; the law seems to be well established in the case of a single trustee, that at his death the legal title of realty vests eo instanti in his heirs and title to all personal vests in his personal representatives which can be divested only by their voluntary conveyance or by an order of the court in a proceeding to which they are parties.[69] Naturally, the passing of this title to the heirs of per-

[65] Elias v. Schweyer, 17 Misc. 707, 40 N. Y. Sup. 906.

[66] Pyle v. Pyle, 137 App. 568, 122 N. Y. Sup. 256.

[67] R. C. L. 1276.

[68] Reichert v. M. & Ill. Coal Co., 231 Ill. 238, 83 N. E. 166, 121 Am. St. Rep. 307; Oxley v. Butler County, 121 Mo. 614, 26 S. W. 367; Lenvine v. Gerardo, 60 N. Y. Misc. 261, 112 N. Y. Sup. 192.

[69] Davis v. Lusk, 191 Ill. 620, 61 N. E. 483; Gulick v. Bruere, 42 N. J. Eq. 639, 9 Atl. 719; Woodruff v. Woodruff, 44 N. J. Eq. 349, 16 Atl. 4, 1 L. R. A. 380.

sonal representatives is subject to the trust.[70] It is well settled that the author of a trust has the right to say in what manner a vacancy in the office of trustee shall be filled, and where this has been done through the deed creating the trust, the vacancy cannot be filled in any other way, unless there is a failure on the part of the remaining trustees to perform this duty, in which case a court of chancery will interpose.[71]

[70] Lawrence v. Lawrence, 181 Ill. 248, 54 N. E. 918.

[71] Golder v. Bressler, 105 Ill. 419.

CHAPTER XIV.

TRUSTS DISTINGUISHED FROM OTHER ORGANIZATIONS.

NOT A PARTNERSHIP.

140—*In General.*

The language of the declaration of trust is the true guide in determining whether a partnership or a trust is created. In so far as possible in construing an instrument, the court will take into consideration the intention of the parties and will give effect to their intention if no fundamental principles of law have been violated. The distinctive feature between a trust and a partnership is that of control and power, i. e., who controls the trust estate and who has the power to contract and subject it to liability. We have the answer to these two questions in the rule which determined whether a trust or a partnership was created in the case of Connally v. Lyons,[72] wherein the court said:

"There was no contract of partnership; the trustee acted as such under an appointment from the court and had the entire control and sole management of the business; there was no right of control whatever reserved in the instrument to the beneficiaries as such. A test of partnership is the right of control over the property or profits, or to make disposition thereof."

Where the trustees hold title to all property and are free from the will of the beneficiaries, then a trust is created; but if

[72] 82 Tex. 664, 18 S. W. 799, 21 A. St. Rep. 935.

the beneficiaries have the power to remove a trustee or in any way control his action in so far as he is fulfilling his duty as trustee, then a partnership is created. There are a great number of decisions in which the question of partnership in trust instruments is taken up; two of them may be considered leading cases on the subject of trusts distinguished from partnerships. The first one is Williams v. Inhabitants of Milton,[78] in which the trust instrument and the relation of shareholders to the trustees was involved; the court held that a trust was created and not a partnership. The case is reported substantially as follows:

Taxes were assessed against the trustees of the Boston Personal Property Trust on the theory that they were partners; they, as trustees, filed suit stating that they were trustees and for that reason they asked for an abatement of the taxes assessed against them. The Boston taxes were assessed on the theory that the property held by the plaintiffs (the trustees) under that trust was partnership property to be assessed under St. 1909, c. 490, pt. 1, sec. 27, in Boston where the partnership —if there was a partnership—had its place of business. The other taxes were assessed upon the theory that the property held by the plaintiffs under that trust was held by them as trust property, the income of which was payable to another person and was to be assessed under St. 1909, c. 490, pt. 1, sec. 23, cl. 5.

It was contended in effect if not in terms that whatever was its true character the trust, for the purpose of taxation, was a partnership. Doubtless, the legislature might provide that a trust which was not a partnership should be treated as a partnership for the purpose of taxation; but it has not done so.

[78] 215 Mass. 1, 102 N. E. 355.

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[78] 215 Mass. 1, 102 N. E. 355.

What the legislature has done is to provide that "personal property held in trust by an executor, administrator or trustee, the income of which is payable to another person, shall be assessed to the executor, administrator or trustee in the city or town in which such other person resides, if within the commonwealth," and if he resides out of the commonwealth, in the place where the trustee resides (St. 1909, c. 490, pt. 1, sec. 23); and that "partners, whether residing in the same or in different cities or towns, may be jointly taxed under their firm name where their business is carried on, for all the personal property employed in such business, except ships or vessels." (St. 1909, c. 490, pt. 1, sec. 27). That is to say, the legislature has provided that the right to tax property as trust or as partnership property depends upon the real character of the property taxed. Under these enactments of the legislature, there is no room for holding that property which is in reality not partnership property can be taxed as partnership property. The right to tax property as trust or as partnership property depends upon what the character of the property taxed really is. The court here proceeds to a discussion of the principles on which the question of the true character of the Boston Personal Property Trust depends, and says that:

141—*What Constitutes Partnership.*

Where persons associate themselves together to carry on business for their mutual profit, they are none the less partners because (1) their shares in the partnership are represented by certificates which are transferable and transmissible, and because (2) as a matter of convenience (if not of necessity in case of transferable and transmissible certificates) the legal title to the partnership property is taken in the name of a third

person. The person in whose name the partnership property stands in such a case is perhaps in a sense a trustee. But speaking with accuracy, he is an agent who for the principal's convenience holds the legal title to the principal's property.

Several instances of such partnerships are to be found in our reports. In Hoadley v. County Com'rs. of Essex,[74] one Gordon McKay executed a declaration of trust by which he declared that he held his patents for sewing the soles of boots and shoes to the vamps, his factory where machines were manufactured under these patents and the whole business theretofore carried on by him in trust, for such persons as should buy certificates which were to be issued under that declaration of trust to the amount of 50,000 in number, the proceeds to be used in carrying on the factory and business assigned to and held by the trustee. The certificate holders were to be known as the McKay Sewing Machine Association and the business to be conducted by an executive committee to be chosen by them. This was held to create a partnership, and for that reason the shares were held not to be taxable to the holders of them; there is a subsequent case involving the same association, where the same conclusion was reached.[75] In Whitman v. Porter,[76] certain subscribers associated themselves together to buy a ferry-boat to be run between Agawam and Springfield; the boat was to be conveyed to one of the subscribers "in trust" and the entire business was to be conducted by these trustees and their officers to be annually elected by the subscribers. The stock was assignable. These stockholders were held to be partners. In Phillips v. Blatchford,[77] the money to carry on the business of manufacturing and selling grates was raised by the sale of

[74] 105 Mass. 519.
[75] Gleason v. McKay, 134 Mass. 419.
[76] 107 Mass. 522.
[77] 137 Mass. 510.

transferable certificates issued under a somewhat similar declaration of trust which provided that the business should be carried on by a board of managers of whom the trustee was to be one, and the other members were to be elected by the shareholders. This also was held to be a partnership. In Ricker v. American Loan & Trust Co.,[78] the doctrine of these cases was extended to a case where the purpose of the association was to buy cars to be leased to a specified railroad. The persons providing the purchase money were to have transferable certificates, which certificates by the terms of the lease to the railroad were to be paid in ten annual installments with six per cent. interest until paid. The certificate holders were declared in the declaration of trust to be an association, and all the business was to be transacted by a board of managers to be elected by them. The property of the association was to be held by the American Loan & Trust Company, as trustee. This also was held to be a partnership. Williams v. Boston,[79] was a similar case. The trust agreement in that case provided that the trust was established "for the purchase, development and disposition of" the former site of the Museum of Fine Arts in Boston. The property was to be held by trustees, but the shareholders had a right to remove the trustees, and meetings of the shareholders were to be held at which the shareholders might authorize or instruct the trustees in any manner and alter or amend the declaration of trust, or direct the trustees to end the trust, sell the property and distribute the proceeds. The original papers in the case show these to have been the facts in the case, although they are not stated in the report of that decision. The property of this association was held to be taxable as partnership property.

[78] 140 Mass. 346, 5 N. E. 284. [79] 208 Mass. 497, 94 N. E. 808.

In Mayo v. Moritz,[80] on the other hand, it was held that certificate holders under the declaration of trust there in question were not partners. In that case an inventor transferred his invention to trustees, to whom by the terms of the trust indenture, the patent was to be issued when it was allowed. The trust indenture provided for the issue of scrip to those who should furnish to the trustees the money necessary for the more advantageous disposition of the invention. The trust, on which the trustees were to hold the invention and the money produced by the issue of scrip, was to hold, manage and dispose of the invention or any part thereof, or interest therein upon such terms as to them (the trustees) or a majority of them should seem best, the net proceeds to be paid one-half to the inventor and the other half to the holders of the scrip or certificates. The scrip, called in the trust indenture scrip or certificates, was transferable. Vacancies in the office of trustees were to be filled by the remaining trustees. It was held that the scrip holders were not partners, and in that respect the case was "unlike Gleason v. McKay, and Phillips v. Blatchford", supra.

142—*Difference Between Trust and Partnership.*

The difference between Hoadley v. County Commissioners, (involving the same indenture as that in Gleason v. McKay, Whitman v. Porter, Phillips v. Blatchford, Ricker v. American Loan & Trust Co., and Williams v. Boston), on the one hand, and Mayo v. Moritz, on the other hand lies in the fact that in the former cases the certificate holders are associated together by the terms of the "trust" and are the principals whose instructions are to be obeyed by their agent who, for their convenience, holds the legal title to their property, the property is

[80] 151 Mass. 481, 24 N. E. 1083.

their property, they are the masters; while in Mayo v. Moritz, on the other hand, there is no association between the certificate holders, the property is the property of the trustees and the trustees are the masters. All that the certificate holders in this latter case had was a right to have the property managed by the trustees for their benefit. They had no right to manage it themselves, nor to instruct the trustees how to manage it for them. As was said by C. Allen, J., in this same case: "The scrip holders are cestuis que trust, and are entitled to their share of the avails of the property when the same is sold," and that is all to which they were entitled. It was further said in the case of Mayo v. Moritz that the scrip holders had a common interest in the trust fund in the same sense that the members of a class of life tenants and the members of a class of remaindermen (among whom the income of a trust fund and the corpus are to be distributed respectively) have a common interest; but there was no association among the certificate holders just as there is no association, although a common interest, among the life tenants or the remaindermen in an ordinary trust. Another decision in this commonwealth somewhat like Mayo v. Moritz is Hussey v. Arnold.[81]

There is a case in England[81½] in which the distinction between cases like Hoadley v. County Commissioners and Mayo v. Moritz was pointed out and established, and that case is now the established law in England. In this case (decided by the Court of Appeals in 1880) the trust deed provided for the purchase by trustees of shares in the capital stock of eleven different submarine telegraph companies. The money was to be fur-

[81] 185 Mass. 202, 70 N. E. 87. See, also, in this connection, Makin v. Savings Institution, 23 Me. 350, 41 Am. Dec. 389; Burt v. Lathrop, 52 Mich. 106, 17 N. W. 716.

[81½] *Smith v. Anderson*, 15 Ch. D. 247.

nished by the subscribers to whom transferable certificates were to be issued. The income derived from the submarine shares and the proceeds of any sales of them were to be applied by the trustees (1) in paying 6. per cent. interest on the trust certificates issued under the trust; (2) in redeeming these trust certificates at $120; and finally, when (3) all the certificates had been redeemed, the surplus, if any, was to be divided among the former certificate holders. It was held that this was a trust and not a company, association, or partnership which had to be registered under Companies Act of 1862 (25 & 26 Vict. c. 89) Sec. 4. That act provided that "no company, association or partnership shall be formed for the purpose of carrying on any other business (that is to say, any business other than banking) that has for its object the acquisition of gain by the company, association or partnership, or by the individual members thereof unless it is registered." This conclusion was reached on the ground that there is a difference between a partnership where money raised by the issue of transferable certificates is to be held by so-called trustees who are really managing agents, and a trust where money raised by the issue of transferable certificates is to be held by trustees properly so called, and that the distinction between the two is that which we have just stated in detail.

The decision in Smith v. Anderson is the law of England today, although by reason of some special facts in that case and the way in which the question arose, doubts as to the conclusion reached in that case have been thrown out by two or three individual judges.[88]

[88] For the subsequent cases see Crowther v. Thorley, 32 W. R. 330; In re Siddall, 29 Ch. D. 1; In re Jones (1898), 2 Ch. 83, 91. For two cases where the distinction between managing agents who hold the legal title and trustees properly so called is reaffirmed, see In re Thomas, 14 Q. B. D. 379, 383; In re Faure Electric Accumulator Co., 40 Ch. D. 141, 151, 152.

143—*Shareholders not Associated.*

This brings us to the question of the character of the Boston Personal Property Trust. It is plain that it is a trust and not a partnership. By the terms of the indenture of trust the property contributed by the certificate holders, or that bought with money contributed by them (the original trust property could be acquired in both ways by the terms of the indenture of trust) was to be held by the trustees in trust to pay the income to the holders of the certificates, and on the termination of the trust the trust fund or the proceeds thereof were to be divided among them. The certificate holders are throughout called "cestuis que trustent." The certificate holders, or cestuis que trustent, are in no way associated together, nor is there any provision in the indenture of trust for any meeting to be held by them. The only act which (under the trust indenture) they can do is to consent to an alteration or amendment of the trust created by the indenture or to a termination of it before the time fixed in the deed. But they cannot force the trustees to make such alteration, amendment or termination. It is for the trustees to decide whether they will do any one of these things. All that the certificate holders can do is to give or withhold their consent to the trustee taking such action. And the giving or withholding of consent by the cestuis que trust is not to be had in a meeting but is to be given by them individually. As we have said, no meeting of the cestuis que trust for that or any other purpose is provided for in the trust indenture. The trustees of the Boston Personal Property Trust have a right to sell the trust securities and reinvest the proceeds, and also a limited power to borrow on the security of the trust property. The certificate holders have a common interest in precisely the same sense that the members of a class of life tenants (among whom the in-

come of a trust fund is to be distributed) have a common interest, but they are not socii, and it is the trustees, not the certificate holders, who are the masters of the trust property. The sole right of the cestuis que trust is to have the property administered in their interest by the trustees who are the masters, to receive income while the trust lasts, and their share of the corpus when the trust comes to an end.

It has been urged by the learned counsel for the city of Boston that these certificate holders or cestuis que trustent are in effect carrying on the business of buying and selling securities through the trustees as managing agents or directors, and he refers to two facts which (he argues) bear him out in that contention, namely: That the trustees on April 1, 1911, had on hand undivided income to the amount of $51,516.93, and a "surplus capital" amounting to $488,566.35. By the terms of the trust the trustees are authorized to set aside from time to time such portion of the net income as shall not be required for dividends for a "surplus fund," which surplus fund may be subsequently used by them in their discretion in payment of dividends. It appears that the face value of the outstanding certificates is $2,090,500. The surplus fund of undivided income therefore amounts to about 2½ per cent. of the corpus of the fund. The surplus capital of $488,566.35 is about 22½ per cent. of the face value of the outstanding certificates. That is not an extraordinary increase in the value of the corpus of the trust fund during a period of 18 years. But this contention brings out a fact in addition to those already referred to, which shows that the Boston Personal Property Trust is not a partnership, but a trust, and nothing but a trust. When persons engage as partners in buying and selling stocks, bonds and other securities for their mutual profit, the gains made by purchases and sales are profits of the partnership, divisible as such among

those entitled to the profits of the partnership. In case of a trust, on the other hand, any gain made by a change of investments is an accretion belonging to the corpus of the trust fund and belongs to those who own the corpus of the fund. Such gains become part of the corpus as much as the original money contribution to the trust fund. On them the certificate holders or cestuis que trustent are entitled to income while the trust lasts, and to their share of them (because they are included in the corpus of the trust fund) when the trust ends and there is a distribution of the corpus among the cestuis que trust. That is the way in which the trustees of the Boston Personal Property Trust have dealt with gains made by changes of investment of the securities of that trust. That is to say, the trustees have treated gains from sales of securities not as profits of a partnership organized to buy and sell stock for a profit, but as gains on a change made in the vestments of a trust fund.

It was largely with respect to the gains made by sales of the securities of the trust that the special circumstances in Smith v. Anderson raised a doubt as to that being a trust for investment and not a "business that has for its object the acquisition of gain." It was provided in the trust deed in Smith v. Anderson that the submarine telegraph shares should not be sold unless they brought a premium of 30 per cent., and that the proceeds of such sales should be used in the same way that the annual income derived from the submarine telegraph shares should be used, namely, in paying interest on the trust certificates and in retiring those certificates at $120.00 a share. They were issued originally at $90 per share. In that respect the trust in question in Smith v. Anderson was quite different from the Boston Personal Property Trust. There is nothing in the trust deed of the Boston Personal Property Trust which is in any way different from a trust under a will except that there

are no limitations over, and the interests of the cestuis que trust are represented by transferable and transmissible certificates.

144—*Acts of Parties Decisive in Determining Intention.*

Up to this time we have not alluded to the declaration in the indenture of trust here in question, that it was the intention of the parties to it to create a trust and not a partnership. It is what the parties did that is decisive. If there had been doubt as to what they did, what they intended to do would have been a matter entitled to some consideration in determining what they did.

It was stated in a passing remark made by this court in Williams v. Johnson,[88] that in the trust before the court in that case the certificate holders were partners within the meaning of that word in St. 1909, c. 490, pt. 1, sec. 27. While that trust provided for meetings of the shareholders and in that respect for some association of and among them, an examination of the original papers shows that it was a trust and not a partnership. This remark was in no way essential to the decision in Williams v. Johnson.

In the Boston Personal Property Trust the property is the property of the trustees, to be managed for the benefit of the certificate holders, but to be managed by the trustees and not by the certificate holders. There is no association of or among the certificate holders. The rights of the certificate holders are limited to each receiving his share of the income of the trust investments during the continuance of the trust and his share of the corpus of the trust when the trust comes to an end. It is in every respect an investment trust and nothing more.

[88] 208 Mass. 544, 552, 95 N. E. 90.

It follows (1) that the property held by the plaintiff as trustees of the Boston Personal Property Trust was not taxable as partnership property, and that in the petition brought by them against the city of Boston they are entitled to an abatement; and (2) that their property was taxable as property held in trust, the income of which was payable to another, and the taxes assessed by the assessors of the city of Waltham and by the assessors of the inhabitants of Milton and of Brookline were properly assessed, and that the petitions against those municipalities should be dismissed.

145—*Trustees May Ask Instructions of Court.*

In the second case,[84] the instrument creating the relationship among the parties was also declared a trust and not a partnership; in that case a bill was filed asking for instructions by the complainant as executor and trustee under the will of William A. Copeland, late of the city of Providence, deceased.

William A. Copeland deceased on March 14, 1913, leaving a last will and testament by which the complainant was appointed executor and also trustee under certain trusts thereby created. The property thus placed in trust included the 625 shares in the Martin-Copeland Company; the complainant duly qualified as executor and had now reached the point in its administration of the estate where it was ready to transfer the residue to itself as trustee. It alleged that it had become uncertain as to some questions involving the interpretation of the agreement of August 8, 1912, under which the Martin-Copeland Company was organized; and especially as to the liability of the holders of the so-called preferred stock thereof; the liability of the trustee

[84] Rhode Island Hospital Trust Co. v. Copeland, 39 R. I. 193, 98 Atl. 273.

when it should come to hold the same under the trusts imposed by the will of William A. Copeland; and as to the proper management and disposition of such stock by the trustee after it should have been duly transferred to it; and formulated its request for instructions as follows:

(a) Whether under said agreement the persons interested therein, the holders of the so-called preferred stock, are or are not under individual and personal liability for any of the obligations or indebtedness of the said trust or association, and, if so, whether the general estate of the said William A. Copeland beyond the amount represented by said shares remains and will remain liable until a transfer of said shares.

(b) Whether your orator, as executor or trustee, can continue to hold said shares of so-called preferred stock without making itself liable in its own corporate capacity for any obligation or indebtedness of said trust or association.

(c) Your orator is further in doubt whether, even if it will incur no personal liability under said agreement, it is proper for it to continue to hold as trustee all of said shares of stock, or any part of them, or whether it ought to convert into cash the whole or some part thereof, and reinvest the proceeds in other trust securities.

146—*Declaration of Trust Determining Factor in What is Created.*

The first question to be determined is whether those interested in the business of the Martin-Copeland Company, called stockholders, are personally liable to creditors as copartners. In other words, is the Martin-Copeland Company a copartnership, and the several holders of shares therein individually liable for its debts, or is it a true trust, where such holders are only

cestuis que trustent? In considering this question, we must first look to the terms of the agreement of August 8, 1912. It is entitled "An Agreement and Declaration of Trust." It commences with a declaration of trust, and its further provisions, embraced in some 40 paragraphs, may be briefly summarized.

The name of the company is fixed; provision is made for the issue of shares, preferred and common, to be represented by certificates; the trustees are authorized to acquire, hold, and dispose of shares in the same manner as though they were not trustees; the shares are made transferable both by act of the party, owner, or by operation of law; the shareholders' rights are defined; title to the property is to be in the trustees only; they are given the most ample powers to deal with the property forming the subject-matter of the trust; they are authorized to make by-laws and regulations, to represent the shareholders in legal proceedings, to indemnify themselves or any of them from the trust property for liabilities incurred in the carrying out of the trust, and to determine what is income and what is capital for the purposes of the trust.

The number of trustees is fixed at not more than four. They are authorized to appoint officers; the authority of the officers is outlined; provision is made for the appointment of new trustees, and for authority to one or more of the trustees to delegate their powers to another of the trustees. They are authorized to call meetings of the common shareholders at any time they see fit, and are required to do so on request of the holders of twenty-five per cent. of the common shares outstanding. Provision is made for the calling of meetings of the common shareholders; for the voting at such meetings by proxy and for share votes, 40 per cent of the outstanding common shares being required for a quorum.

The trustees are empowered to fix the compensation of offi-

cers and agents; they are especially prohibited from binding the shareholders personally, and the latter are not to be liable for any assessment. The trustee's acts within the powers conferred by the agreement and declaration are done as trustees and not individually, and persons contracting with the trustees are required to look to the fund, and not to the trustees personally, nor to the stockholders, for payment. No bond is required of any trustee, and each is liable only for his own wilful breach of trust. Any one paying money or other property to the trustees is not required to see to the application of the money or property.

The trustees are given power to declare dividends on both classes of shares, but the amount and payment of them is in the sole discretion of the trustees, except that preferred dividends shall be at the rate of 6 per cent. per annum and no more, and they have priority over common dividends. They are empowered also to create a reserve or surplus fund.

Provision is made for amending the agreement and declaration on certain conditions and in a certain manner. The trusts may be terminated by two-thirds vote of the common shareholders, and they are limited in any event to 21 years after the death of certain identified persons. Thereupon the affairs of the trust are to be wound up in a specified manner.

147—*Profit Sharing in Relation to Partnership.*

The respondents have in their brief referred to and commented upon some of the earlier English cases in which the sharing of profits was the test applied in determining whether or not a partnership existed. While these cases are interesting and instructive, they do not demand any particular notice at

this time. In the year 1860 the case of Cox v. Hickman,[85] after having passed through the inferior courts where the old "sharing profit" test had been applied and a partnership found to exist, reached the House of Lords for final decision. The decision was unanimous. Lord Cranworth said in his opinion:

"The law as to partnership is undoubtedly a branch of the law of principal and agent; and it would tend to simplify and make more easy the solution—the questions which arise on this subject, if this true principle were more constantly kept in view."

Though the case of Cox v. Hickman may have brought into existence the test of principal and agent as embodied in a judicial decision, such test had long before been suggested, for we find in Story on Partnership, Sec. 1 (1841):

"Every partner is an agent of the partnership; and his rights, powers, duties, and obligations are in many respects governed by the same rules and principles as those of an agent. A partner, indeed, virtually embraces the character both of a principal and of an agent."

In Cox v. Hickman, Smith & Son, Ironmongers, etc., were embarrassed. A creditors' meeting was held. The creditors could force bankruptcy, and through a trustee take possession of the plant and business. Instead, they elected five trustees, who took over the plant and business and ran the same for the creditors with a provision for its being turned back to Smith & Son when the creditors were paid. Two persons named as trustees, the defendants, who were also creditors, refused to act as trustees. A debt was contracted by the acting trustees; it was represented by a promissory note which was not paid. Suit was brought against the defendants to charge them as

[85] 8 H. L. 268.

partners because of their signing the deed and agreeing to take the profits of the business as conducted by the acting trustees, and upon this point Lord Cranworth said:

"I have hitherto considered the case as it would have stood if the creditors had been merely passively assenting parties to the carrying on of the trade, on the terms that the profits should be applied in liquidation of their demands. But I am aware that in this deed special powers are given to the creditors, which, it was said, showed that they had become partners, even if that had not been the consequence of their concurrence in the previous trust. The powers may be described briefly as, first, a power of determining by a majority in value of their body, that the trade should be discontinued; or, if not discontinued, then, secondly, a power of making rules and orders as to its conduct and management. These powers do not appear to me to alter the case. The creditors might, by process of law, have obtained possession of the whole of the property. By the earlier provisions of the deed they consented to abandon that right, and to allow the trade to be carried on by the trustees. The effect of these powers is only to qualify their consent. They stipulate for a right to withdraw it altogether, or, if not, then to impose terms as to the mode in which the trust to which they had agreed should be executed. I do not think that this alters the legal condition of the creditors. The trade did not become a trade carried on for them as principals, because they might have insisted on taking possession of the stock, and so compelling the abandonment of the trade, or because they might have prescribed terms on which alone it should be continued. Any trustee might have refused to act, if he considered the terms prescribed by the auditors to be objectionable. Suppose the deed had stipulated, not that the creditors might order the discontinuance of the trade or impose terms as to its

management, but that some third person might do so, if, on inspecting the accounts, he should deem it advisable; it could not be contended that this would make the creditors partners, if they were not so already. And I can see no difference between stipulating for such a power to be reserved to a third person, and preserving it to themselves."

In the case of Wells Stone Co. v. Grover,[86] where the situation was practically the same as the case at bar, the court said:

148—*Where Trustees are Master a Trust is Created.*

"The trustee doubtless was accountable in equity for the faithful discharge of his duties as such trustee, and a court of equity might in a proper case interfere. But while the business was being managed by the trustee he was absolute master thereof—as much as though he himself had a beneficial interest therein. The assignor could not dictate how the trustee should conduct it, what purchases or sales he should make, or have the slightest voice in its affairs. It was the business of the trustee so long as the trust continued, the assignor having only an indirect interest in the successful management thereof. He was not the proprietor of the business, and the trustee was not his agent. It is always the case that the trustee has no interest in the management of the affairs confided to him by the trust instrument, and that the cestui que trust is the only person beneficially interested therein. And yet it has never been held, or even supposed that the beneficiary is liable for debts contracted by the trustee in so handling the trust property as to create an income for such beneficiary."

In Smith v. Anderson, supra, a case involving questions similar to the case at bar, James, L. J. said in overruling the Mas-

[86] 7 N. D. 460, 75 N. W. 911, 41 L. R. A. 252 (1898).

ter of the Rolls: "I cannot find that this deed constitutes any association whatever between the persons; therefore, I cannot arrive at the conclusion that the certificate holders form an association within the meaning of the act of Parliament." Coming now to the consideration of later cases involving the question as to what constitutes a partnership and what a true trust, the court finds in Williams v. Milton, supra, that there is a partnership relation when the certificate holders are associated together by the terms of the "trust" and are the principals whose instructions are to be obeyed by their agent who for their convenience holds the legal title to their property—the property being their property and they being the masters. On the other hand, if there is no association between the certificate holders, the property is the property of the trustees, and the trustees are the masters. Then the certificate holders have only a right to have the property managed for their benefit. They have no right to manage it themselves, nor to instruct the trustees how to manage it for them, and it becomes a true trust. As the court further said, quoting from Mayo v. Moritz:[87]

"The scrip holders are cestui que trust, and are entitled to their share of the avails of the property when the same is sold." The scrip holders had a common interest in the trust fund, in the same sense that the members of a class of life tenants and the members of a class of remaindermen (among whom the income of a trust fund and the corpus are to be distributed respectively) have a common interest. But in Mayo v. Moritz, supra, there was no association among the certificate holders just as there is no association, although a common interest, among the life tenants or the remaindermen in an ordinary trust. The certificate holders or cestui que trustent as they are

[87] 151 Mass. 481-4, 24 N. E. 1083.

called in the trust deed, have a common interest in precisely the same sense that members of a class of life tenants (among whom the income of a trust fund is to be distributed) have a common interest, but they are not socii, and it is the trustees and not the certificate holders who are the masters of the trust property. The sole right of the cestuis que trust is to have the property administered in their interest by the trustees who are the masters, to receive income while the trust lasts and their share of the corpus when the trust comes to an end.[86]

When we examine the agreement of August 8, 1912, under which the Martin-Copeland Company was organized, in the light of the authorities which we have cited, we cannot escape the conclusion that such agreement evidences both in intention and in law a true trust, and not a partnership.

NOT SUBJECT TO CORPORATION ACTS.

149—*In General.*

Corporations are the creatures of franchise; they exist, not as a matter of right, but from a privilege granted by the state; they have a capital stock, a board of directors and officers. A trust is created as a matter of right, it has its estate the title and control of which is in the trustees, it may have transferable beneficial interests and officers. In effect, the functioning of these two organizations is practically the same, and for that reason the question is raised as to whether the trust may not be brought under the control of the corporation law. That the trust is not a corporation has been definitely and decisively set-

[86] Also Hussey v. Arnold, 185 Mass. 202, 70 N. E. 87; Makin v. Savings Institution, 23 Me. 350, 41 Am. Dec. 389; Burt v. Lathrop, 52 Mich. 106, 17 N. W. 716.

tled;[89] if it is not a corporation, it may not be subjected to corporation acts for the reason that the underlying principles governing a trust are entirely different from those of a corporation. The rules and regulations governing the latter are to be found in the statutes of the various states and in the corporate law which essentially is the authority for what a corporation may do.

The trust is founded upon a right,[90] it is organized as a right, and as such may do exactly what a citizen or an individual may do. The reverse is true of a corporation whose action is restricted to the law of its creation. The principle that the trust is not subject to the rule of law governing the corporation is set forth in the decision of State v. Lee.[91] In this case a trust was organized in St. Louis, Missouri, known as the Great American Home Savings Institution, for the purpose of conducting a building and loan association. The state refused to issue a certificate authorizing the trust to do business; suit was instituted against the state in which the trust asked for a writ of mandamus commanding that the certificate of authorization to do business be issued to it. The state set forth that the petitioners were not a legal entity and not a trust; but that they were a limited partnership and were subject to the corporate law of Missouri. The points raised in this case, the arguments advanced, and the unanimous decision of all the sitting judges that a trust is not subject to the corporation law, are of such value to this subject that the case is reported practically in full, as follows:

[89] See Trust as an Entity. Elliott v. Freeman, 220 U. S. 178, 55 L. Ed. 424; Spotswood v. Morris, 12 Idaho 360, 6 L. R. A. (N. S.) 665, 85 Pac. 1094; Gleason v. McKay, 134 Mass. 419; Baker-McGrew Co. v. Union S. & T. Co., 125 Ark. 146, 188 S. W. 802.

[90] See Rights Distinguished from Law.

[91] 233 S. W. 20.

The Great American Home Savings Institution is a voluntary unincorporated association of individuals formed for the purpose of accumulating a fund or funds to be used under the terms of the trust agreement for the purpose of enabling the contributors to such fund or their assigns to secure a loan or loans for the purpose of acquiring a dwelling house or farm, or other income-producing property, or discharging a mortgage or other incumbrance thereon. The business intended to be carried on under said trust agreement is, to all practical intents and purposes, the same as the business now being conducted by corporations doing a building and loan association business in this state.

Said trust agreement provides for the issuance of trustees' certificates in the amount not exceeding $100,000 to provide an initial fund which is in the nature of a permanent guaranty fund and furnishes funds to meet immediate loan demands, and is to stand as a guaranty to the maintenance of the loan and trust fund. The trust agreement further provides for the issuance of trust certificates on the monthly installment plan in denominations of $1,000 and multiples of $100 in excess thereof. The holders of said trust certificates are to pay thereon in monthly payments the sum of $6.50 per $1,000 face value for a period of 132 months. The loan and trust fund is created from these monthly payments by setting aside $6.20 per month out of each monthly payment after the first three payments, and said fund is to be maintained upon a 4 per cent basis, compounded monthly, which is the liability of the Great American Home Savings Institution on account of said fund. The Great American Home Savings Institution agrees to establish and maintain said loan and trust fund at all times unimpaired. The first three monthly payments of $6.50 and 30 cents of each subsequent payment of $6.50 per each $1,000 face value of certifi-

cates shall belong to the general funds of the trust and will be available for overhead and operating expenses.

The trust agreement further authorizes the issue of a "full-paid interest-bearing certificate" subject to the approval of the Supervisor of Building and Loan Associations. Hence the Great American Home Savings Institution has three sources available for raising funds to make loans to home builders: First, by the issuance of $100,000 of trustee certificates which cannot be issued for less than their par value; second, the issuance of the installment trust certificates; and, third, the issuance of full-paid interest-bearing certificates.

150—*Rights of Certificate Holders.*

The owner of the trust certificate shall be entitled to a loan equal to its face value to be made from the "loan and trust fund" (or from funds created by the issuance of trustees' certificates) in the order of written application made therefor and subject to the rights and priorities of other certificate owners—the security tendered for said loan being satisfactory. The said loan shall be made only for the purpose of the purchase or building of a home, purchase of farm, or other improved income property, or making improvements thereon or paying off mortgage, deed of trust, or other incumbrances existing thereon. In the event a certificate owner does not avail himself of the borrowing privilege, then at the end of 11 years he collects his investment plus his share of the surplus profits earned in the "loan and trust fund," not to exceed $308 per $1,000 face value of the certificate, which means the maximum amount to be repaid on the $1,000 trust certificate held by one who has not exercised the loan privilege and has deposited 132 monthly payments of $6.50 (or a total of $858) is $1,308. However, $1,000 is the guaranteed liability of the institution.

Loans made from the loan and trust fund under the terms of the trust certificate are to be repaid by the borrower in 132 monthly installments of $11.19 per $1,000, which cover both principal and interest on the loan. In other words, any one who borrows $1,000 from the loan and trust fund repays the Great American Home Savings Institution in 132 monthly payments of $11.19 each, or an aggregate of $1,477.08, which is a return of the principal with interest at the rate of 7.72 per cent. per annum. By reference to the actuarial opinions of Messrs. Harvey and Shepherd, the sum of $6.20 per month set aside to the loan and trust fund from the $6.50 monthly payment by the holder of trust certificate for 132 months, less the first three payments, improved with interest at the rate of 7.72 per cent. earned on loans, will equal $1,248.37 at the end of the time. That is, the individual share of each certificate owner in this fund and its earnings at 7.72 per cent. interest will amount to $1,248.37 per $1,000 face value of certificate, and since the liability assumed on the certificate is limited to $1,000, this actuarial opinion shows a surplus profit earned on the money set aside to the loan and trust fund for the "exclusive benefit and profit of certificate owners" of $248.37 on each individual certificate of $1,000. But under the terms of the certificate "all surplus earnings from interest, fines, transfer, and waiver fees, cash surrender, and partial paid-up values" belong to the non-borrowing owners of trust certificates, to the "extent of, but not to exceed, a total surplus of $308 per $1,000 face value." So that the Great American Home Savings Institution does not profit by the earnings from these sources on account of the $6.20 placed in the loan and trust fund unless said earnings exceed $308 per $1,000.

151—*Cash Surrender Value of Trust Certificate.*

The loan privilege provides that—

"When loan is made for any of the purposes defined herein, this certificate may be surrendered, in which event the owner shall be credited with its accrued value, equal to $6.20 of each monthly deposit made on each $1,000 face value of this certificate less the first three, with interest at the rate of 6 per cent. per annum, which may be applied as part equity requirements for said loan or withdrawn in cash at the option of the owner."

Trust certificates become nonforfeitable after four monthly deposits have been made; that is, the holder may surrender his certificate and receive in lieu thereof a paid-up certificate for the total amount paid in, less the first three payments, which paid-up certificate matures 11 years from date with interest at 5 per cent. per annum.

The trust certificate gives its owner a cash surrender privilege at the end of 3 years or at the end of any year thereafter equal to $6.20 of each monthly deposit made, less the first three payments, with interest at the rate of 5 per cent. per annum thereon, plus its share of surplus earned, not to exceed 2 per cent. more, or certificate owner may borrow 80 per cent. of the accrued cash value after one year at 8 per cent. discount by giving certificates as collateral security.

152—*Duties of Directors.*

The affairs of the Great American Home Savings Institution are under the general direction of a board of directors selected by the holders of trustees' certificates. The board of directors shall cause a full and accurate set of books of account to be kept in which shall be kept a full record of all of the transactions of the institution, and a full report of the financial con-

dition shall be made by the president of the trust at all annual meetings of the trustees. The board of directors shall be charged with the duty of taking proper action by all proper methods in order to afford a proper and equitable administration of the affairs and business of the trust.

Under the plan of organization and operation and under the law which relators seek to do business, the trustees or managers of the Great American Home Savings Institution shall from time to time furnish such surety bonds to secure the faithful performance of their trusts as may be required by the Supervisor of Building and Loan Associations of Missouri, and the Great American Home Savings Institution shall be subject to the supervision and examination of the Supervisor of Building and Loan Associations of Missouri, similar, in so far as applicable, to his supervision and examination of building and loan associations.

153—*Trustees' Certificates Assignable.*

This is not a case of a capitalized association seeking incorporation, as a bank or trust company, which must have a certain proportion of its stock paid up. The statute provides "that no such association shall commence business in this state until it shall first submit to the Supervisor of Building and Loan Associations a detailed statement of its plan of doing business and a copy of the contracts proposed to be issued, and procure from him a certificate authorizing it to do business." Under this clear mandate, no steps can be taken towards the accumulation of a fund until the authority to do business has been obtained. The objection that the trustee certificates are assignable and trustees become or cease to be trustees by the mere purchase or sale of trust certificates, without any right in the creators and

beneficiaries to object, is without merit. The right to sell is incident to ownership. We are unable to see any valid objection to the plan of doing business or the election of officers.[92] It is a matter that concerns the contracting parties, purely a matter of convention, unless contrary to the statute.

An association being solely a creature of convention between the members, no check exists upon its power to enact such constitution or by-laws as the associates may choose to adopt, so long as they do not provide for the commission of illegal acts, are not in themselves contrary to public policy, or do not affect vested interests. Such constitution and by-laws constitute a contract between the members, and are binding alike on the association and its members. The courts possess no power to pass on the question of the reasonableness of such rules and regulations as are agreed to by associates for the conducting of their joint affairs. It has been uniformly held, however, that the courts may, in a proper case construe and fix their meaning.[93]

Counsel for relators sum up the matter in their brief:

"No valid objection can be made that the trustee certificates are to be assignable. The assignability of such certificates has long been recognized at common law."[94]

The trust agreement makes full provision for safeguarding the rights of the beneficiaries. It is shown by the best actuarial authority in this state that the plan is financially sound. In fact, this is conceded by the pleadings in this case, and respondent makes no point in that regard. When this is considered in connection with the further fact that the trustees managing

[92] State ex rel. v. Swanger, 190 Mo. 561, loc. cit. 570, 89 S. W. 872, 2 L. R. A. (N. S.) 121, 4 Ann. Cas. 563.

[93] 4 Cyc. 305.

[94] King v. Webb, 14 East 406; Warner & Roy v. Beers (N. Y.), 23 Wend. 103.

this trust are at all times subject to the control of a court of equity and by virtue of section 10263, supra, are under the constant supervision of the Supervisor of Building and Loan Associations of Missouri, it becomes difficult to conceive how stronger safeguards could be made to protect the investing public.

154—*Trust Agreement Does Not Create a Partnership.*

In the brief, however, counsel for the amicus curiae contend that the relator association is a partnership, and it cannot limit its liability. This issue is not made in the pleadings. If it were, it would be inconsistent with other contentions in the brief, that it is a bond investment company, a corporation, that it has no legal entity or artificial personality, that it is a co-operative association and a lottery. How can it be all these? How it can assume these protean characters at one and the same time is bewildering. The declaration that it is a corporation is a solemn negation that it is a partnership, or a joint-stock company, or a bond investment company. The pleas are inconsistent and self-destructive.[95] If it is a lottery, it is an outlaw and all contracts made with it are void.

Counsel cite, in support of their contention that it is a partnership.[96] Judge Bond was there considering the liability of a member of a joint-stock company engaged in manufacturing and trading to its creditors. The learned jurist said, at page 63:

"While there is some variance in the authorities as to what steps must be taken before the members become liable in this

[95] Wertheiner-Swartz Shoe Co. v. McDonald, 138 Mo. App. 328, loc. cit. 339, 122 S. W. 5; Darrett v. Donnelly, 38 Mo. 492; Ledbetter, v. Ledbetter, 88 Mo. loc. cit. 62, 31 Cyc. 150.

[96] Laney v. Fickel, 83 Mo. App. 60.

manner to third parties, all the cases are agreed that such liability is consummate upon a showing that the member joined the association, attended its meetings, and consented to the engagement out of which the liability arose.[97] The case at bar presents all these elements of liability in plaintiff's connection with the company. He was therefore liable as a copartner with his other associates for the claim sued upon by him, since they were valid obligations against the joint-stock company itself."

It is thus seen that the liability of the member was bottomed on his consent, while a partner is liable for the acts of the other partners in a trading concern within the scope of the partnership business, whether he consents or not.[98]

155—*Liability Limited to Trust Funds.*

The limitations on the liability of members is found in paragraphs B and M of the articles of association, which read:

"(B) That no trustee, director, or officer of said savings institution shall be personally liable for any debts properly chargeable against said institution, or any fund or funds thereof.

(M) That trustee certificates shall be issued to each trustee evidencing their interest in such form as the directors may provide, and said certificates shall contain a clause providing that when the same has been paid in cash at its par value the liability of said trustee is limited to the funds invested therein."

It must be remembered that this is a non-trading concern. In Coleman v. Knights of Honor,[99] Judge Rombauer said:

[97] Hunnewell v. Willow Springs Canning Co., 53 Mo. App. 245.

[98] 30 Cyc. 503 et seq.

[99] 18 Mo. App. 189, 194.

"Nor can we see how the member or those claiming under him can be heard to assert that the rules established by the corporation in that regard were not reasonable. The member is a voluntary party to the compact, and as such bound by it unless it is in derogation of some charter right, or is otherwise invalid as contravening some paramount provision of law. A by-law may be void as to strangers, or members who do not assent to it, and yet good as a contract between members of the corporation who do assent to it."

In State v. Stone,[100] the defendant represented as agent an association of 100 residents of the state of New York who were conducting insurance upon the manner of the ancient Lloyds before said individuals had procured a license to do business in Missouri. By the terms of the agreement or articles of association, each of the 100 subscribers agreed to deposit $1,000, and it was stipulated that each subscriber should be separately liable to the amount authorized by him individually, and not jointly liable with the other subscribers. Judge Burgess said:

"If, then, we are correct in our position in construing the statute as including and meaning individuals, there is no apparent reason why defendant could not have obtained from and why the insurance commissioner could not have issued to him a valid certificate under sections 5910 and 5911 of the statute, if defendant had shown to him that those whom he represents had complied with the law in regard to insurance companies doing business in this state."

In Hammerstein, Ex'r., v. Parsons,[2] syllabus 1 reads:

"While the members of an unincorporated association are partners inter sese, their rights against each other may be lim-

[100] 118 Mo. 388, 24 S. W. 164, 25 L. R. A. 243, 40 Am. St. Rep. 388.

[2] 38 Mo. App. 332.

ited by contract, and the constitution and by-laws of the association constitute a contract between them."

So, while the question is not raised by the pleading and need not be considered, it is clear that it was competent for the members to contract as to their liability inter sese.[8]

156—*Corporation Act not Applicable to Trusts.*

It is contended that relator must be incorporated before it can do business; that the power to sue and be sued, to acquire, sell, and convey property, to do business as a legal entity and the powers incident thereto, are sovereign grants of powers possessed only by corporations, and it is, therefore, subject to the chapter on corporations.

The answer to this contention is the statute itself. Section 10263, R. S., expressly exempts associations of the character mentioned there in from the other provisions of article 10, c. 90, R. S. The emergency clause of that act declares that "such associations are not prohibited by law and should be encouraged." By that act the legislature declared the policy of the state.

But it is said that the assumption of corporate powers without a sovereign grant, brings an unincorporated association within the definition of a corporation. The statute itself is the sovereign grant. But for this enactment, associations of the character authorized thereby could not exist.

Respondent contends that these associations are corporations by force of section 11 of article 12 of our Constitution, which reads:

"The term corporation as used in this article shall be construed to include all joint-stock companies or associations hav-

[8] See citation from 4 Cyc. 305.

ing any powers or privileges not possessed by individuals or partnerships."

In Williams v. U. S. Express Co.,[4] the defendant contended that, being a joint-stock company, it was not a suable entity, The court held (quoting section 2963, R. S. 1909, now section 9722, R. S. 1919, which is a copy of the section of the Constitution referred to) that:

"A joint-stock company at common law was a hybrid midway between a corporation and a partnership, e. g., it had directors and officers, articles of association, a common capital divided into shares; these shares represented the interest of the members, were transferable without the consent of the other members; hence there was no delectus personae, and the death of the member did not dissolve the company.[5] Construing together sections 2963 and 2990 of article 1, c. 33, Revised Statutes 1909, and section 1760, art. 4, c. 21, Revised Statutes of 1909, we cannot but arrive at the conclusion that the defendant, being a joint-stock company, and, therefore, having powers and privileges not possessed by individuals and partnerships, must be treated as a corporation for the purposes of said chapters 33 and 21, and as such can "sue and be sued, complain and defend in any court of law or equity' as a legal entity."

In Weihtuechter, et al. v. Miller,[6] White, C., referring to Williams v. U. S. Express Co., supra, and other cases, shows that joint-stock companies have been recognized as entities entitled to sue and be sued, and that the "legislature evidently understood that such associations (voluntary unincorporated associations) could be sued, for by the act of 1915 they pro-

[4] 195 Mo. App. 362, 191 S. W. 1087.

[5] State ex rel. Pearson v. Louisiana & Missouri River R. Co. et al., 196 Mo. loc. cit. 536.

[6] 276 Mo. 633 loc. cit. 329, 208 S. W. 39.

vided a method for service of process upon them the same as upon corporations. Laws 1915, p. 225."

In Great Southern Fire Proof Hotel Co. v. Jones,[7] the court, in construing a similar article in the Constitution of Pennsylvania, said:

"The only effect of that clause is to place the joint-stock companies or associations referred to under the restrictions imposed by that article upon corporations, and not to invest them with all the attributes of corporations."

This contention was made in Spotswood v. Morris,[8] and the section of the Idaho Constitution identical with section 11, supra, was cited. In disposing of the point Sullivan, J., said:

"The association under consideration is not a corporation exercising any of the powers or privileges of corporations not possessed by individuals or partnerships. It is a voluntary association. To possess or exercise powers or privileges of corporations requires a sovereign grant—a franchise which said association has not and does not profess to possess."[9]

The court noted the fact that eighteen states, among them Missouri, had practically identical sections defining corporations in their constitutions.

It is obvious that the article of the Constitution and statute referred to do not by legislative fiat convert joint-stock companies or voluntary associations into corporations or require their incorporation before doing business. At common law voluntary unincorporated associations could not sue or be

7 177 U. S. 449, 20 Sup. Ct. 690, 44 L. Ed. 842.

8 12 Idaho 360, 85 Pac. 1094, 6 L. R. A. (N. S.) 665.

9 Note: The trust being organized as a matter of right requires no grant or franchise from the state. See "Rights Distinguished from Law."

sued.[10] By an amendment to Section 1760, R. S. 1909, suits may be brought against any such association "in the name it has selected." Section 1186, R. S. 1919. Respondent will not contend that this amendment required such societies to be incorporated or made them corporations.

The contention that the relator association is a bond investment company and cannot do business without compliance with sections 10333-10338, R. S. 1919, is unsound for the reason that it is not a corporation nor does it seek to do a bond investment business within the meaning of the statute referred to.

Section 10263, R. S. 1919, under which relator seeks to do business, is a part of article 10, c. 90, R. S. 1919, and expressly exempts associations organized under it from compliance with the other sections of that article. The legislature, in its wisdom, has required that every association organized under this section shall submit to the Supervisor of Building and Loan Associations a detailed statement of its plans, etc., and procure from him a certificate authorizing it to do business, and imposes on the Supervisor the duty of examining into such association and if it is not in conflict with the laws and Constitution of this state, he shall issue his certificate authorizing it to do business. This requirement is exclusive. The relator is not required to obtain permission to do business from the State Bank Commissioner under section 11919, R. S. 1919, commonly called the "Blue Sky Law." "Expressio unius est exclusio alterius."

157—*Trust Protected in Trade Name.*

It is claimed in the return that the name of the association

[10] Lilly v. Tobbein, 103 Mo. 477 Rep. 887. (8), 15 S. W. 618, 23 Am. St.

"Great American Home Savings Institution" is an imitation of the American Home Building & Loan Association, a corporation domiciled in the city of St. Louis, or is so near thereto as to be likely to mislead the public. It is admitted by the pleadings that prior to the time relators applied for a certificate to do business relators were advised by the then Secretary of State that the name adopted "was available for their use, and that same did not conflict with any corporate name then in use in this state.

The name of a corporation or of an unincorporated association is a necessary element of its existence, and the right to its exclusive use will be protected upon the same principle that persons are protected in the use of trade-marks.[11] In Supreme Lodge, Knight of Pythias, v. Improved Order Knights of Pythias,[12] it was held that the latter name was not an infringement on the former. The court said:

"To me it is self-evident that no careful person could think that these two orders were identical, and, as has been said, in cases of this class the question is whether the similarity is calculated to mislead the ordinary run of mankind. There certainly is just as much distinction between these two names as there is between that of the Episcopal Church and the Reformed Episcopal Church, or that of the Presbyterian Church and the United Presbyterian Church."

We think there is little, if any, resemblance between the name of the relator association and that of the American Home Building & Loan Association, at least none that is calculated to mislead the ordinary run of mankind.

11 State ex rel. v. McGrath, 92 Mo. 355, loc. cit. 357, 5 S. W. 29, 5 C. J. 1343 (31).

12 113 Mich. 133, 71 N. W. 470, 38 L. R. A. 658.

158—*Business Under Trust Agreement Enjoys No Special Privileges.*

Respondent contends that section 10263, R. S., denies the equal protection of the law, in violation of section 1, art. 14 of the Amendments to the Constitution of the United States, in that it allows the association referred to to be licensed, supervised, and examined without cost to such association, and throws the burden of the expense thereof upon the building and loan associations. Section 10230, R. S. 1919, provides that every incorporated building and loan association shall make semi-annual reports to the supervisor, and that with such report each association shall pay 25 cents for each $1,000 of assets shown by such report, which payments go into the state treasury to make up a fund known as the "building and loan supervision fund." The salaries of the supervisor and of his examiners and employees and the cost of maintaining the department are paid out of this fund. Section 10263 makes no requirement of incorporated building and loan associations.

Can the Missouri State League of Building and Loan Associations raise this question? It is not a party to this case, and cannot be heard to call in question the constitutionality of this act in an action between other parties.

"Laws enacted by the legislature are presumed to be valid, and, even if defective because violative of some provision of the state Constitution, are not void, although they may in a proper case be voidable; that is, upon complaint by a party whose rights are impaired by such statute. Upon this point Cooley says: 'The statute is assumed to be valid, until some one complains whose rights it invades.' 'Prima facie, and upon the face of the act itself, nothing will generally appear to show that the act is not valid; and it is only when some person at-

tempts to resist its operation, and calls in the aid of the judicial power to pronounce it void, as to him, his property or his rights, that the objection of unconstitutionality can be presented and sustained. Respect of the legislature, therefore, concurs with well-established principles of law in the conclusion that such an act is not void, but voidable only; and it follows, as a necessary legal inference from this position, that this ground of avoidance can be taken advantage of by those only who have a right to question the validity of the act, and not by strangers."[13]

We think it is a misconception that the statute grants to relator a special privilege or immunity.

"Such association shall from time to time furnish such surety bonds to secure the faithful performance of their trust as such Supervisor of building and loan association shall reasonably require, and be subject to his supervision and examination, similar in so far as applicable to his supervision and examination of building and loan associations."

It cannot be reasonably inferred from this that this section grants or contemplates free inspection or free service in any respect. When the statute requires supervision and examination similar in so far as applicable to the supervision of building and loan associations, it adopts and incorporates the statute referred to, so far as applicable, and by necessary implication entitled the Supervisor to the fees appertaining to such service. The laborer is worthy of his hire.[14]

It is said that section 10263, R. S., violates section 5 of ar-

[13] State ex rel. v. Blake, 241 Mo. 100, loc. cit. 107, 144 S. W. 1096, Ann. Cas. 1913C, 1283. See, also, Ex Parte Tartar, 278 Mo. 356, 213 S. W. 94-96; State v. Bockstruck, 136 Mo. 335 (8), 38 S. W. 317; State v. Bixman, 162 Mo. 1 (3), 62 S. W. 828.

[14] 36 Cyc. 1152; Crohn v. K. C. Home Tel. Co., 131 Mo. App. 313, 109 S. W. 1068.

ticle 12 of the Constitution of Missouri, in that it permits corporations to conduct their business in such a manner as to infringe the general well-being of the state. Section 10263 has no reference to corporations. It deals solely with unincorporated associations. But, aside from this, section 10263 subjects this class of societies to the wholesome supervision and examination of the Supervisor of Building and Loan Associations. It is not seen that it permits them to conduct their business in a manner to infringe on the general well-being of the state.

159—*Building and Loan Business May be Conducted as a Trust in Missouri.*

Finally, it is said that section 10263, R. S., permits lotteries in violation of section 10 of article 14 of the Constitution. It authorizes the accumulation of a fund or funds for the purpose of enabling the contributors to such funds or their assigns to secure loans. A simple reading of the statute excludes every conception of a lottery. It forbids the issue of a certificate authorizing an association to do business if the business is in conflict with the laws and Constitution of the state. Section 10 of article 14 of the Constitution outlaws lotteries.

Criticism is made of the plan for making loans; that they must be made in the order of their application. Any other plan would savor of favoritism. Counsel cites Silver v. Investment Co.[15] The facts in that case show that the scheme was an unmitigated gamble, if a scheme in which the contributor will always fail and the investment company can never lose may be so characterized. The difference between that case and the case at bar is the distance between the poles.

[15] 183 Mo. 41, 81 S. W. 1098.

There are other suggestions made in the return; e. g., that the act of 1919 (section 10263) is void because the title is defective and because it is special and class legislation and violative of public policy. Although they are not mentioned in the brief, we have considered these suggestions and find no merit in them. Courts cannot declare statutes void on the ground that they are against sound public policy and morals and liable to lead to corruption and oppression.[16]

Finding, as we do, that the relators are clearly entitled to a certificate authorizing them to do business as an unincorporated association under section 10263, R. S. 1919, it is ordered that a peremptory writ be issued as prayed.

All concur, except ELDER and WOODSON, JJ., not sitting.

ENGLISH RULE.

160—*In General.*

The trust as a business organization has been and is being used quite extensively in England, as in this country; it has had to stand the test of litigation, and the principles upon which it is founded are thoroughly sustained by the courts of that country. There has been much litigation in reference to the trust problem in England, as to whether it was a partnership, or an association, or whether it was subject to their corporation act. These questions were all raised and involved in the case of Smith v. Anderson,[17] and the same rule of law was laid down there as in this country that a trust as such has a distinct place in the law, separate and apart from partnerships, corporations and associations. Portions of the above case have been read into a great number of our decisions in upholding the trust as

[16] 8 Cyc. 778.

[17] 15 Ch. D. 247.

a business organization. The logic and the decisiveness of the opinion in this case is of such a nature as to make it a leading case, both in England and this country. It is of such importance in the settlement of the law in reference to trusts that it is reported herewith in substance, as follows:

The present action was commenced in March, 1879, by H. R. Smith, a holder of one certificate, on behalf of himself and all other holders of certificates, against the trustees. The statement of claim alleged that the defendants and the holders of certificates were an association of more than twenty persons, formed after the passing of the Companies Act, 1862, for the purpose of carrying on business that had for its object the acquisition of gain by the association or the individual members thereof without being registered as a company under the Act, or in pursuance of any other Act, or of any letters patent; and that the drawing the certificates for purchase by lot was a lottery or a transaction of the nature of a lottery and was contrary to law; and that the provisions relating to such drawing rendered the trust an illegal association. The plaintiff claimed to have the funds distributed among the certificate holders in proportion to the amounts subscribed or paid by them respectively for their certificates, or otherwise according to their interests therein.

The action came on for trial before the Master of the Rolls on the 19th of December, 1879.

Jessel, M. R.:—

This case has been argued before me, nominally with a view to distinguish it from Sykes v. Beadon,[18] but, of course, that is not the real meaning of the argument. It is, as Mr. Chitty told me candidly, and I am very glad of it, in order that the case

[18] 11 Ch. D. 170.

may be taken to the Court of Appeal, where, of course, the decision of Sykes v. Beadon itself will be reviewed. There really are no substantial differences between that case and the present.

161—*Meaning of the Word Business.*

As regards the only point which was not elaborately discussed in Sykes v. Beadon, the meaning of the word "business," I must say a few words. In Sykes v. Beadon the only point I had to consider was whether it was an association formed for the purpose of gain. The supposed distinction between an association formed for the purpose of gain and an association formed for the purpose of taking upon itself a business having for its object the purpose of gain was not there argued, but it has been argued since, and I have given an opinion upon it which I will repeat. First, what is the meaning of "any other business"? Now "business" itself is a word of large and indefinite import. I have before me the last edition of Johnson's Dictionary, edited by Dr. Latham, and there the first meaning given of it is, "Employment, transaction of affairs"; the second, "an affair"; the third, "subject of business, affair, or object which engages the care." Then there are some other meanings, and the sixth is "something to be transacted." The seventh is, "something required to be done." Then taking the last edition of the Imperial Dictionary, which is a very good dictionary, we find it a little more definite, but with a remark which is worth reading: "Business, employment; that which occupies the time and attention and labour of men for the purpose of profit or improvement." That is to say, anything which occupies the time and attention and labour of a man for the purpose of profit is business. It is a word of extensive use and indefi-

nite signification. Then, "Business is a particular occupation, as agriculture, trade, mechanics, art, or profession, and when used in connection with particular employments it admits of the plural that is, businesses." Therefore the Legislature could not well have used a larger word.

In addition to the two dictionaries I have also looked at the case of Harris v. Amery,[19] in which forty-six people hired some land to carry on a farm, that is, they carried on the farm between them. A single man carrying on a farm may farm his own land, but he is carrying on a business. Sometimes he is called a gentleman farmer, but he is still carrying on a business, and, of course, these forty-six persons were carrying on a business, and it was held that it was an illegal association under this very Act of Parliament, because there were more than twenty of them. The passage I am about to read is from the judgment of that very eminent and lamented Judge Mr. Justice Willes:[20] "It should seem, by the 25 & 26 Vict. c. 89, s. 4, that the Legislature, viewing the frauds which had been committed by large companies, and the great inconvenience which was found to arise by reason of the difficulty of enforcing claims and settling accounts between surviving members and executors of deceased members, and otherwise, have thought fit to determine that no company, association, or partnership consisting of more than twenty persons, shall be formed for the purpose of carrying on any business that has for its object the acquisition of gain by the company or its members, unless registered under the Act. And I think it has done that by language which does not admit of any reasonable doubt. It is unnecessary to refer to authorities to show that 'business' has a more extensive signification than 'trade.' The earlier Bank-

[19] Law Rep. 1 C. P. 148. [20] Law Rep. 1 C. P. 154.

rupt Acts did not embrace farmers: but it was never doubted that farming was a 'business' though not a 'trade.' Banking is not strictly a trade. Where land comes to a number of persons by operation of law, they cannot be said to be partners, and they may, consistently with the Act, farm it. But when we find an association like this, which is rendered illegal by an Act of Parliament, we cannot take notice of the agreement under which they become tenants, for the purpose of establishing a right in a Court of law, or hold that the occupation by one of their body is an occupation by all the members of the illegal association."

162—*What Constitutes Doing Business.*

Now, knowing what "business" means, is there any distinction between a person carrying on any other business which has for its object the acquisition of gain, and the words "formed for the purpose of the acquisition of gain"? It must be a business to acquire gain, and really the words add nothing to it. "Formed for the purpose of gain," as I put it in Sykes v. Beadon,[81] is the same thing. You cannot acquire gain by means of a company except by carrying on some business or other, and I have no doubt if any one formed a company or association for the purpose of acquiring gain, he must form it for the purpose of carrying on a business by which gain is to be obtained. But whether that be so or not, I am clearly of opinion that where investment is made a business, or where the dealing in securities is made a business, it is a business within the purview of this Act. There are many things which in common colloquial English would not be called a business, even when carried on by a single person, which would be so called when

[81] 11 Ch. D. 170.

carried on by a number of persons. That is a distinction not to be forgotten, even if we were trying the question by the ordinary use of the English language. For instance, a man who is the owner of offices, that is, of a house divided into several floors and used for commercial purposes, would not be said to carry on a business because he let the offices as such; but suppose a company was formed for the purpose of buying a building, or leasing a house, to be divided into offices, and to be let out, should not we say, if that was the object of the company, that the company was carrying on business for the purpose of letting offices, or was an office-letting company, trying it by the use of ordinary colloquial language? The same observation may be made as regards a single individual buying or selling land, with this addition, that he may make it a business, and then it is a question of continuity. A man occasionally buys and sells land, as many landowners do, and nobody would say he was a land-jobber or dealer in land, but if a man made it his particular business to buy and sell land to obtain profit, he would be designated as a land-jobber or dealer in land.

When you come to an association or company formed for a purpose, you say at once that it is a business, because there you have that from which you would infer continuity; it is formed to do that and nothing else, and, therefore, at once you would say that the company carried on a business. So in the ordinary case of investments, a man who has money to invest, invests his money and he may occasionally sell the investments and buy others, but he is not carrying on a business. But when you have an association formed, or where an individual makes it his continuous occupation—the business of his life to buy and sell securities—he is called a stock-jobber or share-jobber, and nobody doubts for a moment that he is carrying on business. So, if a company is formed for doing the very same thing, that is

for investing money belonging to persons in the purchase of stocks and shares, and changing them from time to time, either with limited or unlimited powers, I should say there can be no question that they are carrying on a business, whether you call it a business of investment or a business of dealing in securities, or, as in the case before me, both the business of investment and the business of dealing in securities.

163—*What is Doing Business for Gain.*

Upon the other point, as to this company being formed for the acquisition of gain, can there be any doubt about it? The prospectus was not stated in the statement of claim, but it was admitted, and Mr. Chitty admitted it as if it were stated, so that it is before the Court and may properly be looked into, for in ascertaining whether the association was formed for that purpose, nothing can be more important than the prospectus. It is not to be formed for the purpose, unless registered as a company under this Act, and the prospectus tells me exactly what it was formed for. The prospectus is as good, or better evidence upon that point than the deed, but, of course, they must both be looked at to ascertain for what purpose the company was formed. Was it for the acquisition of gain? I have discussed that question so fully in so many cases, and two of them are reported, In re Arthur Average Association,[22] and Sykes v. Beadon,[23] that it is not necessary for me to say anything more upon the view I take of the Act. But I must look at the prospectus as well as the deed to see whether the acquisition of gain is really the purpose of the company. I have no doubt about it at all. To my mind it is as clear as anything can be, though it does not follow that it may not be equally

[22] 3 Ch. D. 522. [23] 11 Ch. D. 170.

clear the other way to some other mind or minds. The public are invited by the prospectus to subscribe their money to buy the shares of the Submarine Cable Companies. They are told that they are to buy them at £90 a certificate. "The certificate is to bear 6 per cent. per annum, payable half yearly, making £6 13s. 4d. on the amount paid." That is a very accurate calculation. Therefore, they are to get £6 13s. 4d. upon surplus income to the extent of the available funds, by purchase in the open market or tender, or failing these means, by yearly drawings at £120. So that a certificate holder is to get a profit of £30 upon his £90 if he is lucky enough to be a drawer, or if they are bought by tender; and there is to be "an equal reversionary distribution of the securities of the trust among the certificate holders as soon as the certificates have been redeemed." Therefore, over and above £6, 13s. 4d. per cent., which is itself a very handsome profit, and not the ordinary rate of income derivable from investments, a certificate holder is to get £30 profit upon his £90, and also the equal reversion in distribution of the balance when the certificates are all paid for.

Those are the three first paragraphs of the prospectus. It is not an ordinary investment in any sense of the word; it is a speculation with a view to a profit by means of the purchase of submarine Cable shares, and it would be an abuse of the term to call this an investment, though the purchase of speculative property in a sense, and in a very wide and lax sense, may be termed an investment. Then after naming the trustees, I come to the next paragraph, which is a very good illustration of what kind of investments we are dealing with. "The advantage of this form of investment, by distributing the risk over a number of kindred undertakings, and making one insure the other, is peculiarly applicable to the class of property to be embraced in this trust." That is, the public are told it is risky property.

The next sentence is, "The public has already shewn its appreciation of the principle in the case of Foreign and Colonial Government Securities, and it is believed that many would gladly avail themselves of the high returns yielded by Telegraph Cable Companies, if they were relieved from the fear of exceptional losses from accident or other causes which would be greatly lessened by such a combination." It is no ordinary investment, the public are afraid to touch it because it is risky, but if you distribute it in the shape of insurance by associating together you will diminish your risk, and thereby get a profit.

The next sentence but one shews that the company was formed for a high rate of profit: "The trust will consist solely of the stocks, shares, or debentures of submarine cable companies, which offer, apart from accidental interruptions, the prospect of a high rate of profit." Then there is this further statement; "The selection and acceptance of the several securities, the proportions in each company to be included, and any purchase to be made, will be determined and undertaken by the trustees at their discretion, who will endeavour to secure a fair average, having regard to the ends in view." Then it is stated how the trustees are to apply the funds. First they are to pay a limited amount of expenses; then to pay interest on the certificates; then there is to be a sinking fund for their redemption; then they say how they will be redeemed. Then, "Power will be reserved to the trustees to realize, at their discretion, any securities belonging to the trust which reach a premium of 30 per cent. on the purchase price." That is a dealing. The trustees are not to sell unless they get a large profit, but they are to sell when they get to 30 premium. Then it says: "Subject to any special circumstances calling for an earlier dissolution under the terms of the trust deed, it is intended that the trust should continue until all the certificates have been thus

redeemed, when the trust securities will remain for distribution as a reversion. The trust will then be wound up, and the proceeds be distributed pro rata among the holders of the coupons of reversion."

This, then, is the purpose for which the company is formed. The certificate holders are not only to get the profit I have mentioned, but an ultimate profit—an ultimate distribution of the funds. That is no ordinary investment where the property is to remain invested; on the contrary, all the certificates may be paid off out of income, it being a very large rate of profit, and then the securities are to be divided, the coupons giving the right to the reversion. The prospectus further states: "A person desirous of holding submarine cable shares can thus, by means of this trust, at a minimum of trouble and expense, diminish the risk of investing in any one particular undertaking, by spreading his investment over a number of different undertakings, and reserve a portion of the extra interest as a sinking fund to pay off his capital; as for each £100 invested he virtually becomes a holder of pro rata investments in some eight or ten different securities, and in addition receives a bonus when his certificate is redeemed, and a pro rata participation in the ultimate reversion which will remain when the return of his capital has been accomplished. The advantages are, (1) Interest at £6 13s. 4d. per cent. on the amount subscribed. (2) Distribution of risk"—not a term that persons use for ordinary investments. (3) Provision for redemption of certificates; if by purchase, securing for his property an enhanced market value, or, if drawn, a gain on £30 per certificate. The first part which I read used the term "profit," now we have the term "gain." Then, (4) A reversion eventually divisible equal to the whole of his original subscription. It is further stated that a draft of the trust deed may be seen. This trust deed was

actually drawn after the investments were made, although I do not see that that makes much difference after having read the prospectus to see what the company was formed for. Then it is provided that the trustees are to hold the annual produce of the investments in trust, "first, in payment of all expenses during the preceding year, but so that the ordinary expenses for the year 1871, or in any subsequent year, include all remuneration to the trustees and auditors." They are called trustees, but they are, no doubt, directors. They are, like all directors, commercial trustees, but they are intended to be paid—not improperly, because they really are directors and nothing else.

There are two or three clauses in the deed which it is necessary to read to shew that there was a dealing in shares by this company, as well as an ordinary investment. An association for that purpose would, in my opinion, be within the mischief of the Act and within the words of the Act. It must not be supposed that I decide this case simply on the addition of the dealing clauses, but an association for the purpose of dealing would also be, in my opinion, within the mischief of the Act and the words of the Act also; consequently, it is as well to refer to them to shew that it is so.

The 18th clause is this: "It shall be lawful for the trustees, at their discretion, to sell any of the said scheduled securities, if and when such security shall be capable of being sold in the market, and shall be sold by the trustees at a premium of not less than 30 per cent." So that the moment they rise to that the trustees may sell and take the profit, which is to be divided as we shall see presently.

The 19th section provides that except when they get the 30 per cent. premium, none of the scheduled securities shall be sold or otherwise converted into money, unless in pursuance of a unanimous resolution passed at a meeting of the trustees

called with express notice of the object, at which there are present not less than four trustees. Out of the six managing parties four must concur at a meeting at which they are present to sell them, but subject to that limitation, they have a right to sell without any premium at all. Here, again, therefore, there is a second power of sale not referred to in the prospectus. Then the produce is to be applied as surplus, that is, in payment of interest and in payment for and purchasing of the certificates. Then there is a proviso, "That it shall be lawful for the trustees, if it shall be so decided by a unanimous resolution of the trustees, at a meeting called with express notice of the object, at which all the trustees are present in person or by proxy, and such resolution shall be confirmed at a meeting of the certificate holders summoned for that purpose by advertisement in two London daily papers, to invest the produce of any such sale or conversion, or any part of the same, in the purchase of such securities of the same character as the scheduled securities, as they shall select for that purpose." So there is a power not only to sell but to repurchase. I agree that, inasmuch as in this large association—and this is admitted by the learned counsel and has always been intended to be conceded—there are more than twenty persons, for I see on the prospectus there is not to be a company formed unless £400,000 is subscribed, you cannot get the assent of every individual, but power is given to the trustees at the general meeting. It is a part of their business, therefore, though no doubt a primary object, but it is an object, to deal in the securities in the way I have mentioned.

The 22nd clause is this: "The trustees may deduct for the year 1871, and in every subsequent year, by way of remuneration to them for the trouble and responsibility undertaken by them, any sum not exceeding in the aggregate £1200 per annum." So they are paid trustees, that is, they are directors of

the company. They are persons who carry on the business of the company for payment, they employ their time and they are paid for it. I am not saying a word against that; I think it is a most rational thing that persons who employ their time for the benefit of others should be paid, but it shews their true character, for ordinary trustees of a settlement are not paid. Then it goes on: "The Trustees shall, once every year, by advertisement in some two public daily newspapers published in London, call together a meeting of the holders for the time being of the certificates." That is to shew what the certificate holders are. They are shareholders of the company and nothing else. They are called certificate holders, but it is very clear that they might be called shareholders. Many shareholders, when they are paid, are paid, as we know, by warrants to bearer, and that is what these are. Nobody is to get anything unless he produces his certificate. Then, "The proceedings of the said meeting shall, so far as may be, be conducted in the manner prescribed in Table A to the Companies Act, 1862." Not only is it a meeting of shareholders, although the deed calls it a meeting of certificate holders, but they actually adopt the provisions of the Act for the mode of conducting the business. "The business of the meeting shall be"—that is the other use of the word "business"—"to receive and consider a report from the trustees on the condition and affairs of the trust; to appoint auditors to audit the accounts of the trustees"—that is, of the directors—"and to report to the next meeting of the holders of certificates; to elect new trustees." Again put "directors," and you have the ordinary business of a general meeting. It is the thinnest possible disguise. Then, "If it shall be unanimously decided by the trustees at a meeting called with express notice of the object, at which not less than four trustees are present in person or by proxy, that any extraordinary

expenses should be incurred, they may incur the same accordingly, subject to the same being confirmed by resolution of the certificate holders assembled at any general meeting." Then there is a provision in the 30th clause: "If any of the persons parties hereto"—that is, the trustees—"shall die or become incapable to act, or shall retire from the trusts, then and in every such case it shall be lawful for the general meeting of the certificate holders by resolution to appoint a new trustee or new trustees in the place of the late trustee or trustees. That is giving the directors a lifehold directorship, but it is nothing more. Then the 32nd clause empowers the general meeting of certificate holders to require the trustees to enter into a new deed of covenant in the same form as this.

It does appear to me that this is as plain a company or association formed for the transaction of business for the purpose of gain as could be put fairly into words, if you change names and nothing more. If you call the certificate holders "shareholders," and call the trustees "Directors," and call the association a "company," changing those three names, you have about as simple a description of an ordinary company under the Act as I think you can well have. I am satisfied, as far as I am concerned, that this is not only within the words of the Act, but is the very thing, as explained by the judgment of Mr. Justice Willes, which the Act intended to prohibit for various reasons, and that this is a mere device, and a very transparent one, to endeavour to escape from the plain meaning of the enactment. I should have said that without any possibility of hesitation, were it not that I have been told that either this deed or some similar deed was settled in consultation by two very great legal luminaries at the Bar. That may be so, and if it is so, it will only form another instance among many which have come before me shewing that where counsel are instructed to carry out

an object they do their best to carry it out, and the more difficult it is the more pains they take, and then valuing their work, not by its real result, but by the trouble it has caused them, they deceive themselves into the idea that they have succeeded in evading an Act of Parliament and have carried the purpose which they have been instructed to accomplish; they produce that which satisfies themselves, although it satisfies no judicial authority when it comes to be considered by a Court of Justice.

The judgment declared that the Submarine Cables Trust was an association consisting of more than twenty persons formed after the passing of the Companies Act, 1862, for the purpose of carrying on business that had for its object the acquisition of gain by the association, or by the individual members thereof, without being registered as a company under the said Act, or any other Act of Parliament, and ordered that the affairs of the association should be wound up; with consequential inquiries and directions.

164—*Trust for Investment—Distinguished from Doing Business.*

The Defendants appealed. The appeal came on to be heard on the 13th of July, 1880.

Chitty, Q. C., and Speed, for the Appellants:—

We say that this is not carrying on a business. It is a trust for investment; the advantage being that the trustees can invest in a number of different securities of this class, so that the risk of loss by some proving bad is diminished, the average being good. Such an investment is not a "business." That word in its widest sense includes all the transactions of life, but that is not its meaning in the Companies Act, 1862. Again, if this be

a business, the cestuis que trust are not associated for the purpose of carrying it on. They meet, indeed, but only for very limited purposes—they cannot control the investments and they cannot change the trustees who have the management. Suppose a coal owner left his colliery upon trusts for thirty of his grandchildren, vesting the whole management in the trustees; the grandchildren cannot be treated as an association of thirty persons within the Act; the trustees are the only persons carrying on the business, and so they are here. Cox v. Hickman[24] shews that the certificate holders are not partners. "Business" in the Act means something in the nature of a trade. Reg. v. Whitmarsh,[25] under 7 & 8 Vict. c. 110, is in our favour as to this not being a business. The case of In re Arthur Average Association[26] is very different from this, and the question whether the association was legal was not finally decided by the Court of Appeal. Supposing, however, the decision of the Master of the Rolls in that case to be upheld, the holding that a mutual insurance company where the company as a body makes no gain is within the Act really does not bear upon the question whether a trust like this is within it. Sykes v. Beadon[27] is very similar to the present case, but is a recent decision of the same Judge, and is in fact to be treated as under appeal, though in that case the trusts more nearly resembled the carrying on a business than here. In the present case the object simply was to invest in a class of stocks paying a large dividend, not to carry on anything like stockjobbing or speculating in shares. The powers of changing investments are of a very limited description, and shew the intention that, except in special circumstances, the original securities should be retained.

[24] 8 H. L. C. 268.
[25] 15 Q. B. 600.
[26] Law Rep. 10 Ch. 542.
[27] 11 Ch. D. 170.

Articles 18, 19, 20, shew that it was no part of the scheme to carry on a business in buying and selling shares, and the conduct of the trustees shew that this was what was intended: hardly any change has been voluntarily made in the investments.

165—*Company, Association and Partnership Defined.*

James, L. J.:—

This case has been very fully argued, and we have had an opportunity of considering it since the time it was first argued before us. We, therefore, need not postpone our judgment.

With all deference to the very clear opinion of the Master of the Rolls, I cannot concur in the construction which he has put upon the 4th section of the Companies Act, 1862.

The Act was intended, as it appears to me, to prevent the mischief arising from large trading undertakings being carried on by large fluctuating bodies, so that persons dealing with them did not know with whom they were contracting and so might be put to great difficulty and expense, which was a public mischief to be repressed. The enactment upon which the question before us turns is as follows:—"No company, association, or partnership consisting of more than twenty persons shall be formed after the commencement of this Act for the purpose of carrying on any other business" (that is to say, any business other than banking) "That has for its object the acquisition of gain by the company, association, or partnership, or by the individual members thereof, unless it is registered," &c. Now there are three words there, "company, association, or partnership." I cannot understand what the difference is between a company and an association. The word "association," in the sense in which it is now commonly used, is etymologically in-

accurate, for "association" does not properly describe the thing formed, but properly and etymologically describes the act of associating together, from which act of association there is formed a company or partnership. But I believe that according to the vernacular we use on these subjects the difference which the Act intended to draw between a company or association and an ordinary partnership is this: An ordinary partnership is a partnership composed of definite individuals bound together by contract between themselves to continue combined for some joint object, either during pleasure or during a limited time, and is essentially composed of the persons originally entering into the contract with one another. A company or association (which I take to be synonymous terms) is the result of an arrangement by which parties intend to form a partnership which is constantly changing, a partnership to-day consisting of certain members and to-morrow consisting of some only of those members along with others who have come in, so that there will be a constant shifting of the partnership, a determination of the old and a creation of a new partnership, and with the intention that, so far as the partners can by agreement between themselves bring about such a result, the new partnership shall succeed to the assets and liabilities of the old partnership. This object as regards liabilities could not in point of law be attained by any arrangement between the persons themselves unless the persons contracting with them authorized the change by a novation, or unless by special provisions in Acts of Parliament sanction was given to such arrangements.

The Act says that no company, association, or partnership consisting of more than twenty persons shall be formed after the commencement of this Act. For what? "For the purpose of carrying on any business."

166—*Trust Deed Does not Constitute an Association.*

It is contended that the trust deed before us constitutes an association of more than twenty persons formed "for the purpose of carrying on business." I am unable to agree with the Master of the Rolls in the conclusion that it does. I cannot find that this deed constitutes any association whatever between the persons who are supposed to be socii. One man goes with £90 in his hands and buys from the trustees a £100 certificate with all the chance of profit attaching to it. Another man goes the next day and takes his £90 to the same people and gets from them another certificate, by which he gets a right to share in the funds which they have in their hands. The first man knows nothing of the second, and the second knows nothing of the first; they have never come into any arrangement whatever as between themselves. There never has been anything creating any mutual rights or obligations between those persons. They are from the first entire strangers who have entered into no contract whatever with each other, nor has either of them entered into any contract with the trustees or any trustee on behalf of the other, there being nothing in the deed pointing to any mandate or delegation of authority to anybody to act for the certificate holders as between themselves, and nothing, as it appears to me, by which any liability could ever be cast upon the certificate holders either as between themselves or as between themselves and anybody else. Therefore, I cannot arrive at the conclusion that the certificate holders form an association within the meaning of the Act of Parliament, any more than the persons who subscribe for debentures in a railway, or the Bolivian bondholders (whose case was before us in Wilson v. Church), or the creditors in Cox v. Hickman. Persons who have no mutual rights and obligations do not, according to my

of averages, that is to say, that if a large number of different independent securities of a hazardous description are held together the loss upon some will be compensated by the gain on the others, so that a tolerably uniform average rate of interest will be obtained. The object, and the legitimate object, of the persons who were invited to join in this company was to have an investment of their money under such circumstances that they might look to have a high dividend with a very considerable security for the capital which they were investing in it. I can see nothing like an attempt at evading the Act or at doing anything but making investments upon a large scale, so as to obtain the benefit of the doctrine of averages. Under those circumstances, I am of the opinion that the judgment of the Master of the Rolls must be discharged and the action dismissed.

168—*Trustees are Associated.*

Brett, L. J.:—

In this case it becomes necessary carefully to construe the Act of Parliament, and, in so doing, we must consider almost every word and almost every phrase in it, and we must translate, if possible, into the most accurate scientific form the idiomatic English which even in an Act of Parliament is often used, not in its strictly grammatical sense, but in a business sense.

The 4th section of the Act is in a negative form, and enacts that no company, association, or partnership, consisting of more than twenty persons, shall be formed for the purpose of carrying on any business that has for its object the acquisition of gain, unless it be registered. In order to come within this clause, there must be a joint relation of more than twenty persons for a common purpose, which common purpose, as it seems to me, must be the performing jointly a succession of acts. It

will not be sufficient if the relation exists for a purpose which is to be completed by the performance of one act. Moreover, they must be so related together as to form a company, or a partnership, or an association. I confess I have some difficulty in seeing how there could be an association for the purpose of carrying on a business which would be neither a company nor a partnership, but I should hesitate to say that, by the ingenuity of men of business, there might not some day be formed a relation among twenty persons which, without being strictly either a company or a partnership—might yet be an association. But according to all ordinary rules of construction, if the association mentioned in sect. 4 is not, strictly speaking, a company or a partnership, it must be something of a similar kind. It must be a relation established between twenty persons or more "for the purpose of carrying on business," i. e., in order that such company, association, or partnership may carry on the business. The business, therefore, whatever the word "business" may mean, is to be carried on by those twenty persons or more. The expression "carrying on" implies a repetition of acts, and excludes the case of an association formed for doing one particular act which is never to be repeated. That series of acts is to be a series of acts which constitute a business. Now, the word "business" might in a grammatical sense include things which no ordinary person would call a business, and, inasmuch as the Legislature could not particularize every kind of business which they intended to include, they have, in order to confine the meaning of that large word "business," stated that it is to be a business "that has for its object the acquisition of gain." The association, then, must be formed in order to carry on a series of acts having the acquisition of gain for their object.

We then come to deal with the expression "gain by the company, association, or partnership, or by the individual members

thereof." It seems to me that that expression is to be taken distributively, according to the former description of the congregation of persons. Where it is a joint stock company, or a corporation, or quasi corporation, and the individuals are mere shareholders, then the gain which is acquired by the business is a gain by the company, and not a gain by the individual shareholders. But where it is an ordinary partnership, or where it is an association which, not being a joint stock company or corporation, is more like to a partnership, there the gain will be not by the whole body as distinct from the individuals, but by the individual partners.

But the mode in which the gain when obtained is to be distributed does not seem to me to be the real point in this case. The real question is, whether there is here any association of persons at all for the purpose of carrying on a business within the meaning of this section, and if so, then who are those persons.

This being my view of the construction of the statute, I cannot agree with the statement of the question by the Master of the Rolls in Sykes v. Beadon (1). He said that the point which he had to consider was whether there was an association or company formed for the purpose of gain either by the association or by the individual members thereof. But he omitted words which I think were purposely put into this statute for a definite object, namely, that the statute meant to deal. not with people who were associated together for the purpose of obtaining gain, but with people who were associated together for the purpose of carrying on a business having for its object the acquisition of gain.

Let us now consider whether in the present case there were any persons associated for the purpose of carrying on any business such as is described in this clause. If there were such

persons, they must have been either the trustees or the certificate holders. In my opinion neither the one nor the other were associated together for the purpose of carrying on such a business as is described in the Act. I will take first the trustees themselves. The trustees were not, as I construe the deed, to enter upon a series of acts which, if successful, would obtain a gain. They were joined together for the purpose of once for all investing certain money which was delivered into their hands, and not for the purpose of obtaining gain from a repetition of investments. In other words, they were not associated together for the purpose of speculating in shares. That was not their business. There was no reason why, when they had once made an investment, it should, under ordinary circumstances, ever be changed. Therefore, it seems to me that the primary and substantial object of their associating together was not for the purpose of carrying on a business which, if successful, would result in the acquisition of gain. It is true that, under a special state of circumstances which is described in the 18th clause, it might be said that then what they would have to do under that clause and clause 20 might result in a gain. But even if a transaction under those clauses is to be considered as carried on for the purpose of gain, which I doubt, yet that is such a merely subsidiary part of the transactions described in the deed that it cannot be said to be a substantial part of what they have to do; and if the substantial part of what they have to do is not a business, a mere subsidiary provision will not bring them within the Act, as was decided in Reg. v. Whitmarsh[88] and several other cases. I am of opinion, therefore, that the trustees were not associated for the purpose of carrying on a business within the meaning of the clause; and if they

[88] 15 Q. B. 600.

were, they are nevertheless not within the clause because they are fewer than twenty.

169—*Certificate Holders not Associated.*

I now come to the case of the certificate holders. It seems to me that even if what had to be done under the deed was to be done by them by means of the trustees as their agents, nevertheless they were not associated for the purpose of carrying on such a business as is contemplated by the 4th section, inasmuch as what was to be done under the deed did not constitute such a business.

But supposing that this was such a business as is mentioned in the Act, were the certificate holders the persons who were to carry it on? It seems to me that they certainly were not. I take it that the persons called trustees in the deed are clearly trustees as distinguished from agents and from directors. The distinction has been pointed out by my Lord, and I entirely agree with it. If, indeed, although they were called trustees, the duties which they had to perform were really those of directors, then, although they were called trustees, the legal effect of the deed would be that they would be directors, and if they are directors they are agents; but here it seems to me clear that according to the true construction of the deed they were not directors or agents, but trustees. If that be so, the certificate holders, even if they were associated at all, were not associated for carrying on the business. It was not their business. They could not have been made liable for any contract made by the trustees. It was of course urged that they would be liable as undisclosed principals. But that assumes that the persons who made the contracts upon which they are to be liable are their agents authorized to bind them by their contracts,

which is obviously not true. Therefore, even if there be here a business within the meaning of the section, yet it is not carried on by the certificate holders, who are not of the number of twenty or more; and, therefore, in either view the case is not within the statute.

That being so, I venture with great deference to differ from the Master of the Rolls in this case, as also from his decision in Sykes v. Beadon.[29] As regards the case of the Arthur Average Association,[30] it is not perhaps absolutely necessary to determine whether the case of a mutual assurance association is within the statute or not, but I cannot help saying that the reasoning which brings me to the conclusion that the present case is not within the statute, appears to me to lead to the same conclusion with regard to a case of mutual assurance. I am inclined to think that no transaction within the association or company between the members of it can be taken into consideration in order to determine whether the company or association was one formed to carry on a business within the meaning of this section.

170—*A Trust is Not Embraced in the Words Association, Company or Partnership.*

Cotton, L. J.:—

What we have to determine in this case is whether there is an association, company, or partnership within the meaning of the Act of 1862. In my opinion the question turns on Sect. 4 of that Act. Sect. 21 has been referred to, but I do not think that it has any material bearing on the question we have to consider, because the companies which are referred to in sect. 21 might register under sect. 6 of the Act. What we have to consider is

[29] 11 Ch. D. 170. [30] Law Rep. 10 Ch. 542.

not whether the persons under this trust deed, as I call it for the sake of shortness, could register under the Act, but whether they are bound to do so, and in default are an illegal association.

As Sect. 4 has been fully discussed, I will not repeat its terms, but in order to arrive at the construction of the particular portion of the section upon which the question turns it is material to observe that it begins with a restriction as to companies carrying on a well-known business, the business of banking. Then comes a clause upon which the question turns, which is to apply to companies other than banking companies, with certain exceptions. We have in the first part, without any reference to gain or anything else, a description of the business which companies in the first part of it are formed to carry on. Then in the second part we have a reference to companies carrying on any other business, with this qualification, that the business must be one for the acquisition of gain by the company, association, or partnership, or by its members. That, in my opinion, shews that the words "for the purpose of carrying on any business which has for its object the acquisition of gain" are material, and that the section cannot properly be read as saying "any other association having for its object the acquisition of gain." In my opinion there must be a company, association, or partnership, which is formed for the purpose of carrying on a business by itself or its agents. If it is formed for the purpose, it must register if it is within the Act. Then the nature of that business is defined; it must be a business having for its object the acquisition of gain by the company or its members. I do not think it very material to consider how far the word "association" differs from company or partnership, but I think we may say that if "association" is intended to denote something different from a company or partnership, it must be judged by its two companions between which it stands,

and it must denote something where the associates are in the nature of partners. It seems to me (not that I think it material) that it might have been intended to hit the case which we have frequently seen, of a number of persons or a number of firms joining themselves together for the purpose of carrying on a particular adventure in order to make gain by it, as is very common where firms, one in London, another in Liverpool, and another in the East Indies, join together in one or more adventures, the one to carry on the one part of the business, and the other to carry on the other. But, whatever may have been the object of using the word "association," what we have to consider, in my opinion, is whether this conglomeration, as I will call it, of the persons who subscribe their money under this trust deed, is an association formed to carry on any business within the meaning of this section having for its object the acquisition of gain.

But, before giving my view as to that, I will state what I consider to be the effect of this deed. As I understand it, this is a scheme for enabling a large sum of money provided by various persons to be invested on a large aggregate of securities of different companies of a particular class, an aggregate including the securities of so many companies as to give a fair average in that particular class of security. It is obvious, then, upon the doctrine of averages referred to by Lord Justice James, that as they are securities which as a whole produce large profits, though some of them might not produce profit, yet if they were taken in a large number of companies there would in the result be a large yearly sum to be divided from the income of the aggregate of the investments, and when the capital comes to be divided the average result will be that the money of the contributors will be returned with a profit. That was the principle of the scheme. The investments were made in the names

of trustees for a larger number of contributors. It was necessary to make provision for their conduct as to how decisions were to be come to by that body, as to what was to be done with regard to the general business of the trust, and moreover it was incident to the trust that there should be sometimes a change of investment. That is incidental to every trust, and is provided for in ordinary trusts, but here we have no doubt a provision which at first sight looks like carrying on a business. Clause 18 provides that under certain circumstances the securities may be sold, and then by clause 20 they may be reinvested. If it appeared that the real object of the deed was that the trustees should speculate in investments, even though confined to this particular class, the case would have stood in a very different position. In my opinion there is nothing in that sort. This is not a provision that they shall make a profit by selling and buying again securities of this class whenever, in their opinion, the turn of the market makes it advisable so to do. The deed is in substance a trust deed, providing how they are to hold as trustees specified securities of a large amount with provisions enabling them in certain events to sell some of the securities, and enabling them when that is done, but only under special circumstances, to reinvest, not to speculate. In my opinion that is not a deed providing for carrying on a business within the meaning of the Act, it is a deed providing for the holding trust property, with such provisions only as are necessary to enable that to be conveniently done. I am of opinion, therefore, that there is no carrying on business within the meaning of the Act.

But supposing that there is a business within the meaning of the Act, is there an association of more than twenty persons who are carrying it on by themselves or their agents? It was argued by Mr. Ince that the mere fact of these persons put-

ting money, without any contract or communication with each other, into a bank to a common account to be invested by the trustees under the trusts of this deed, made them an association carrying on business for the purpose of gain. What I have already said as to the true construction of the 4th section shews that, in my opinion, that would not be carrying on business. They may do it for the purpose of profit, and most persons when they invest their money do it for the purpose of profit, that is to say, they expect to get a profit in the shape of dividends, and probably also expect that the investment will go up and will produce them a profit when hereafter they may wish to realize. But, in my opinion, what must be shewn is that the association by themselves or by their agents carry on a business. Now, here, how can that be said? That the certificate holders do it by themselves can, I think, hardly be contended. All the power which the subscribers of this money had was to attend sometimes at meetings, and the meetings which were held most usually are those mentioned in clause 26. The only business done at them was to receive and consider a report from the trustees on the condition and affairs of the trust, to appoint auditors to audit the accounts, and to elect new trustees to fill up vacancies. It is impossible, in my opinion, to say that the certificate holders are by themselves in any way carrying on any business by reason of what is done at these meetings. Then clause 20 says that a reinvestment must be sanctioned at a meeting of the certificate holders summoned for that purpose. I have already dealt with the point that under clauses 18 and 20 there is not a power to speculate or to carry on a business, and really all that is here given to the certificate holders is the power to give such assent as cestuis que trust usually give for a change of securities when they are not incapacitated by infancy or otherwise. Of course the number of

cestuis que trust makes it necessary that that should be done in some way which will enable the majority to bind the minority, as otherwise the assent of the cestuis que trust could never be effectually obtained, and, therefore, a form is adopted similar to the provisions in articles of association as to meetings of shareholders, but that is only matter of form. They meet as cestuis que trust to give their assent, not as members of the partnership joining to carry on and control the business of the partnership, even if it were a business.

Then, can it be said that they carry on a business by their agents? In my opinion that cannot be maintained. The trustees here are the only persons who are dealing with the investments, and they are dealing, not as agents for some principal, but as trustees in whom the property and the management of it are vested, and who have the power of changing the investments and securities. That is just like the case which often occurs where the executors or trustees of a will are directed to carry on a business. The fact that they are to account to others for the profits made is a matter utterly immaterial as between them and those with whom they deal. They deal with those persons as the only persons contracting, and hold themselves out as personally liable. Those persons have no right whatever as against the persons beneficially entitled, nor, except possibly in the case of a testator having directed a part of his assets to be employed in the trade, have they any claim whatever against the assets of the testator. Those dealing with executors so carrying on a business deal with them as with any other persons carrying on business and look to no one else, and even although the executors have a right of indemnity if they act properly, that in no way affects or enlarges the contracts which they enter into with third parties. So far as there is any contract here to be entered into by the trustees it is only a change

of investment; so far as there is any business to be carried on it is the business of the trustees, not as agents for principals behind, but their own business, that is to say, a business in which they contract as solely liable to outsiders, whatever may be their rights as against those for whom they are trustees. In my opinion, therefore, in this case the only alleged association of more than twenty, being the persons who have contributed their money, stand in this position, that they are not by themselves or their agents carrying on any business whatever. Therefore, in my opinion, this cannot be said to be an association prohibited by the Act. Of course, if the trustees are carrying on a business for the purpose of profit, as they are not twenty in number there could be no objection under the Act to their doing so.

In my opinion the view which the Master of the Rolls took of this section of the Act of Parliament cannot be maintained, and the action must be dismissed.

CHAPTER XV.

EQUITY.

171—*Jurisdiction.*

Courts of equity have jurisdiction over all questions relative to the establishment and preservation of trusts, and may act upon the application of any one interested.[81] The subject of trusts and the control and regulation of trust estates are not properly cognizable by courts of law, but are exclusively within the jurisdiction of courts of equity,[82] for courts of equity, independent of statute, have inherent and exclusive jurisdiction over all kinds of trusts and trustees, whether the trust arises by express declaration and agreement or results by implication of law.[83] A court of equity in its jurisdiction over trusts is not bound by the technical rules of the common law, and will seek the intention of the grantor from the whole instrument.[84] For the purpose of compelling an accounting, the existence of any confidential or fiduciary relation is sufficient to invoke the aid of a chancery court whenever the duty arising out of such relation rests upon one of the parties rendering an account to the other.[85] A court of equity has jurisdiction of a bill to administer a trust filed by a beneficiary in behalf of himself and all other beneficiaries. For example, facts may be alleged which show that the trus-

[81] Holbrook v. Fyffe, 164 Ky. 435, 175 S. W. 977.

[82] McCoy v. McCoy, 30 Okla. 379, 121 Pac. 176.

[83] Spradling v. Spradling, 101 Ark. 451, 142 S. W. 848.

[84] Buist v. Williams, 88 S. C. 252, 70 S. E. 817.

[85] Wilson v. Kennedy, 63 W. Va. 1, 59 S. E. 736.

tee, although without fault of his own, has been prevented from executing the trust in the manner contemplated, and that there are obstacles in the way of its proper and economical administration which the court can remove.[36]

In a suit to administer a trust, a court of equity acts in personam; and where it has acquired full jurisdiction of the trustee and all other necessary parties, it may direct the administration of the trust, although a part of the property consists of land not within its territorial jurisdiction.[37] A trustee may sue to impress the trust upon money in the hands of a stranger; the bank in which the stranger has deposited the money is also within the jurisdiction of equity as there is no adequate remedy at law.[38] A testator may leave certain real estate in trust for his children for life and the remainder to his grandchildren; equity has original jurisdiction to authorize the trustee to mortgage the interest of the life tenants to raise money.[39] A trust instrument may provide that in administering the trust the trustees shall use their best judgment and not be liable or amenable to any court or person in the exercise thereof; but upon allegation of fraud in the administration of the trust, a court of equity will take jurisdiction and investigate the manner in which the trust was administered, notwithstanding the exemption of the trust instrument to the contrary.[40] A court of equity has jurisdiction to compel a trustee to pay funds into court awaiting final disposition, whether he has misappropriated

[36] Memphis Sav. Bank v. Houchens, 115 Fed. 96.

[37] Memphis Sav. Bank v. Houchens, Supra.

[38] Pennington v. Smith, 69 Fed. 188.

[39] Shirkey v. Kirby, 110 Va. 455, 66 S. E. 40.

[40] Burch v. Gaston, 182 Ala. 467, 62 So. 508.

the fund or not.[41] Where trustees so disagree as to obstruct a prompt and proper execution of a trust, or act mala fide in its execution, a court of equity will interfere and compel them to perform the trust, or will itself execute it.[42]

172—*Jurisdiction Restricted.*

Where a trust is discretionary, equity has no jurisdiction to interfere with its exercise so long as the trustee acts in good faith either in exercising or refusing to exercise the power vested in him;[43] as equity will not interfere with a trustee in the proper discharge of the duties of his trust.[44] Nor will equity enforce an executory agreement, made without consideration to create a trust;[45] nor when trustees are in existence and capable of acting, will a court of equity interfere to control them in the exercise of a discretion vested in them by the instrument under which they act.[46]

173—*Equity Cannot Create a Trust.*

While equity has jurisdiction to control the execution of a trust created, and to prevent a failure thereof, and in doubtful cases to direct trustees as to their duties,[47] and may declare and enforce a trust, it has no authority to create a trust or to make a contract for parties who do not see fit to make the contract themselves under circumstances where no

[41] Bullock v. Anglemen, 82 N. J. Eq. 23, 87 Atl. 627.

[42] Story v. Palmer, 46 N. J. Eq. 1, 18 Atl. 363.

[43] Givens v. Clem, 107 Va. 435, 59 S. E. 413.

[44] Righter v. Riley, 42 W. Va. 633, 26 S. E. 357.

[45] Central Trust Co. v. Gaffney, 157 App. Div. 501, 142 N. Y. Sup. 902.

[46] Nichols v. Eaton, 91 U. S. R. 717.

[47] Morris v. Boyd, 110 Ark. 468, 162 S. W. 69.

trust could be implied or result by operation of law.[48] Where a trust instrument expressly limits investment of the trust funds to certain securities, it is not within the power of a court to change the terms of the trust in that particular by approving unauthorized investments.[49] Equity has no jurisdiction to approve a compromise which in effect would alter the terms of the trust instrument.[50]

174—*Trustees May Seek Instructions From the Court.*

A court of chancery has general jurisdiction of cases in which trustees seek instruction from the court in the performance of their duties, because the trustees are entitled to instruction and direction when in doubt.[51] Unless a trustee petitioning the court for instruction has real and serious doubts as to his duty,[52] and the advice of the court is required for the protection and discharge of his trust, the court is without jurisdiction to entertain such petition.[53] Where no power is given to trustees to invest, reinvest or change the investment of personal property held thereunder, if such course is necessary, it is their duty to apply for leave to do so to the court.[54] A trustee's right to instruction from the court does not extend to the determination of questions not requiring any action by him or which should properly be submitted

[48] Bliss v. Bliss, 20 Idaho 467, 119 Pac. 451.

[49] Internatl. Trust Co. v. Preston (Wyo.), 156 Pac. 1128.

[50] Morris v. Boyd, Supra.

[51] Hill v. Moors, 224 Mass. 163, 112 N. E. 641; Thorp v. Lund, 227 Mass. 474, 116 N. E. 946; Stephenson v. Morris, 128 Wis. 242, 107 N. W. 343.

[52] Crawford v. Nies, 224 Mass. 474, 113 N. E. 408.

[53] Hill v. Moors, Supra.

[54] Branch v. DeWolf, 28 R. I. 542, 68 Atl. 543.

to some other tribunal, but is confined to the discharge of his present duties, and instruction will not be given where the rights of persons in the trust estate are contingent upon the happening of events which have not occurred.[55] The court is without jurisdiction to entertain a bill in equity for instructions upon questions relating to the past administration of his trust;[56] and the rule seems to be that the courts of one state will not advise trustees as to their duties in the administration of the trust concerning real estate located in another state.[57]

An application by a trustee to a court of equity for direction and guidance as to the disposition of the trust funds, when not made in a suit then pending, should be by bill, and not by petition; and the applicant must be in possession of trust funds of which disposition is necessary to be made presently and must show that there are conflicting claims, or the probability thereof, and the existence of no other means of determining rights or demands, so as to protect the trustee from the risks of future liability or controversy.[58] Where the entire control, management and charge of realty is committed to a trustee, primarily to administer it so as to produce by rentals the greatest practicable amount of new revenue, and the trust is to extend in probability over a long but uncertain term, the trustee may, by approval of the court having jurisdiction of the matter, execute the trust by creating leases to continue beyond the life of the trust.[59]

[55] Tibbetts v. Tomkinson, 208 N. Y. 486, 102 N. E. 562; Hill v. Moors, Supra.

[56] Forbes v. Brigham, 232 Mass. 177, 122 N. E. 396.

[57] Thayer v. Fairchild, 25 R. I. 509, 56 Atl. 773.

[58] Staplyton v. Neeley, 44 Fla. 212, 32 So. 868.

[59] Upham v. Plankinton, 152 Wis. 275, 140 N. W. 5.

175—*May Remove Trustees.*

Where a just and proper discharge of a trust or the fiducial duties of the trustee are interfered with by reason of hostility between the trustor and trustee, or a change in trustees becomes advisable because the trust is not being properly conducted, such change can be made by the court,[60] for a court of equity may remove trustees and appoint others in their stead, when required for the preservation of the trust estate.[61] The question of the removal of trustees is largely discretionary with the court, and its exercise of this discretion is not subject to revision on appeal, unless the discretion has been abused.[62] Where a trustee ignores the terms of the trust deed, a court of equity has jurisdiction to remove him and appoint a new one at the suit of the individual members of a committee appointed by the association to look after such trust, since they may sue for the benefit of all the numerous beneficiaries.[63]

The filing of a bill by the trustee asking the instructions of the court as to the execution of the trust does not suspend the power to remove him given to the beneficiaries, but only subjects their action to the supervision of the court.[64] The court will not remove a trustee on the application of a co-trustee, where the reasons for the removal relate to the management of the trust estate involving judgment and discretion, where by reason of business experience the trustee

[60] Smallwood v. Lawson, 183 Ky. 189, 208 S. W. 808.

[61] McKenna v. O'Connell, 84 Misc. Rep. 582, 147 N. Y. Sup. 922.

[62] Carrier v. Carrier, 226 N. Y. 114, 123 N. E. 135.

[63] Guilfoil v. Arthur, 158 Ill. 600, 41 N. E. 1009.

[64] May v. May, 17 Sup. Ct. Rep. 824.

is better qualified to act than the co-trustee.[65]

176—*May Appoint Trustees.*

Equity will not suffer a trust to fail because of a vacancy in the trusteeship, however occasioned, whether by death, resignation, or otherwise, but will substitute a trustee to execute the trust, with or without authorization by the instrument creating it.[66] The chancery court has power to appoint a trustee to administer a trust, where no trustee is in existence, the identity of trustees being a matter of pure judicial discretion,[67] and as the selection of a trustee is in the discretion of the court—though the better practice requires the court to select a resident trustee—there may be circumstances justifying a departure therefrom.[68] Ky. St. Sec. 318 (Russell's St. Sec. 2301) providing that no trust shall be defeated for want of a trustee but equity may uphold the same by appointing trustees, etc., is but declaratory of the rule of equity on the subject; and where a trust is once properly created, the incompetency, disability, or nonappointment of a trustee will not defeat it, as equity will administer and enforce the trust.[69] A court of equity has power under its general powers, as well as under Code Pub. Gen. Laws 1904,

[65] Pyle v. Pyle, 137 App. Div. 568, 122 N. Y. Sup. 256.

[66] Pollock v. House & Hermann, 84 W. Va. 421, 100 S. E. 275; Brandon v. Carter, 119 Mo. 572, 24 S. W. 1035; Rothenbreger v. Garrett, 224 Mo. 191, 123 S. W. 574; Culver v. Lompoc Valley Sav. Bank, 22 Cal. App. 379, 134 Pac. 355; Speer v. Colbert, 26 Sup. Ct. Rep. 202; In re Gay's Estate, 138 Cal. 552, 71 Pac. 707.

[67] In Re Battin, 89 N. J. Eq. 144, 104 Atl. 434; Northrip v. Burge, 225 Mo. 641, 164 S. W. 584.

[68] Dodge v. Dodge, 109 Md. 164, 71 Atl. 519.

[69] Green's Adm'rs. v. Fidelity Trust Co., 134 Ky. 311, 120 S. W. 283.

Art. 16, Sec. 90, authorizing the court to appoint a trustee upon the appointed one refusing to execute the trust, etc., to appoint a testamentary trustee on the death of the surviving trustee and on his heir renouncing the trust.[70]

However, the chancery court is not obliged to appoint the same number of trustees provided for by the trust instrument, when it appoints a trustee to administer the trust; the number of trustees being a matter of pure judicial discretion.[71] Where a declaration of trust provides that in case of the death, resignation, or refusal to act of either of two trustees, a successor may be appointed by the court upon the application of the remaining trustee, if the instrument fails to provide any method of appointment in case both offices are vacant, trustees may then be appointed by the court upon the application of cestuis que trustent.[72] On application of trustees for appointment in place of one deceased, the survivors expressing their desire to resign, a chancery court may appoint a trust company where parties in interest assent.[73] Equity will appoint a trustee on application of one beneficiary under a trust deed, upon notice to the others, where the deed provides that in case of a vacancy the beneficiaries shall join in appointing a trustee, and the feeling between the beneficiaries is such that they will not so join.[74]

70 Dodge v. Dodge, Supra.
71 In re Battin, Supra.
72 In re Borough of Kane, 177 Pa. 638, 35 Atl. 874.
73 In re Battin, Supra.
74 Cone v. Cone, 61 S. C. 512, 39 S. E. 748.

CHAPTER XVI.

LACHES.

177—In General.

As to what constitutes laches in a trust, no general rule can be stated; for the most part, it depends upon the circumstances in the particular case.[75] A person is guilty of laches in equity only when his conduct, negligence, or delay has induced another to do something—or abstain from doing something—whereby the latter would be injured if the former were allowed to enforce his rights, and the doctrine does not protect the fraudulent.[76] Though laches will run against an express trust, courts of equity apply the rule in such cases less readily than in cases of constructive trusts; and rarely ever do so unless the circumstances disclose a defense in the nature of estoppel such as intervention of the rights of third persons, loss of evidence, death of parties and witnesses, settlement or disavowal of the trust acquiesced in by the cestui que trust, or the like.[77] While generally, as between trustee and shareholders, lapse of time is not a bar to the shareholders' action for accounting, yet where the trustee disclaims the trust to the knowledge of the shareholders and remains in unbroken possession, lapse of time may be relied upon as a defense.[78] The refusal of a trustee to execute a deed in compliance with the trust agreement is a repudiation of the

[75] Roush v. Griffith, 150 N. C. 820, 65 S. E. 168.

[76] Taber v. Bailey, 22 Cal. App. 617, 135 Pac. 975.

[77] Roush v. Griffith, Supra.

[78] Rouse v. Rouse, Supra, 96 S. E. 986.

trust, which, if known to the complainants, opens the door to the defense of laches to a suit to enforce the trust.[79]

178—*Actions Barred by Laches.*

A person entitled to impeach a fraudulent transaction of a trustee must do so within a reasonable time, but what is a reasonable time depends upon the facts and circumstances of each case.[80] The rule that where trustees join in executing a power of sale and if one receives the money, all will be responsible, will not be enforced where the one receiving is allowed to hold the money for a number of years with the consent of beneficiaries fully competent to act—no benefit being derived therefrom by the others.[81] Where for a number of years trustees send beneficiaries statements showing a charge of a certain commission, by failing to object to such commission and by failing to apply for a statement of account to the court, the beneficiaries are estopped from objecting thereto when the statement is rendered to the court.[82] After the right to a deed has accrued by reason of a proportionate contribution to the work and expense necessary to obtain it, a delay of eight years will defeat a suit to enforce such right, where complainants have contributed nothing further to the subsequent development.[83]

Where a petition against the executors of a deceased trustee to secure an accounting of the management and disposition of a trust fund is not filed until more than five years after

79 Patterson v. Hewitt, 25 Sup. Ct. 35.

80 Branch v. Bulkley, 109 Va. 784, 65 S. E. 652.

81 Laurel Co. Court v. Trustees Laurel Co. Seminary, 93 Ky. 379, 20 S. W. 258.

82 American Colon. Soc. v. Latrobe, 132 Md. 524, 104 Atl. 120.

83 Patterson v. Hewitt, Supra.

the death of the trustee, and more than four years after the appointment of a substituted trustee; or until the final account of the executors of the deceased trustee has been filed and confirmed and full distribution made thereunder; where the trustee's acts of which complaint is made were open to inspection; and the petition contains no explanation or excuse for the delay in applying for an accounting, the petitioners may be barred by laches.[84] While the purchase by a trustee of the interest of his cestui que trustent is regarded with disfavor, laches will bar the right to relief.[85] If there has been no recognition of the trusteeship during a period of twenty years and the trust estate has ceased to exist, a bill to require an accounting by the administrator of a trustee is barred by laches, for the presumption is a settlement has been made.[86]

179—*Actions not Barred by Laches.*

Neither lapse of time, nor any defense analogous to the statute of limitations, can be set up by the trustee of an express trust as a defense to his ability to execute the trust;[87] and no laches can be imputed to a shareholder for not asserting his rights against the trustee, so long as the former acknowledges the trust relation.[88] Action by the distributees of a trust fund on the trustee's bond for misappropriation of trust funds cannot be defeated on the ground of laches on the part of the distributees prior to the termination of the trust, since distributees' right to enforce distribution did not begin until such time; and the distributees' delay in bringing action

[84] O'Malley v. Mears, 240 Pa. 373, 87 Atl. 862.

[85] McRoberts v. Carneal (Ky.), 44 S. W. 442.

[86] Snodgrass v. Snodgrass, 176 Ala. 276, 58 So. 201.

[87] Preston v. Walsh, 10 Fed. 315.

[88] Reynolds v. Sumner (Ill.), 14 N. E. 661.

on the trustee's bond to recover for misappropriation of the trust funds is no defense, where sureties were not prejudiced by such delay.[89] In an action by the shareholders against the trustees to recover the trust estate, laches in the bringing of the suit cannot be imputed to the complainants until they are informed of some breach of the trust or culpable negligence on the part of the trustees resulting in a loss, which the latter refuses to make good.[90] Laches will not become an equitable bar to the recovery of trust property by the shareholders so long as the trust relationship continues.[91] Where a trustee misappropriates funds and conceals it until the time of his removal—the trust not terminating until later—distributees' delay in bringing action on the trustee's bond after the termination of the trust is not, as a matter of law, prejudicial delay.[92]

Where a beneficiary, shortly after her trustee has carried out a fraudulent transaction with her concerning her property, appears not to have known that it was of a character that she could impeach until shortly before she sues to set it aside; her delay does not preclude relief, especially where the trustee is still in possession of the property without any material change in it, and it does not appear that he has been or will be, prejudiced by the delay.[93]

180—*Estoppel.*

One of the safe-guards of the trustees in addition to their liabilities being limited in the trust agreement to the trust

[89] State v. Northrop, 93 Conn. 558, 106 Atl. 504.

[90] Lindsley v. Dodd, 53 N. J. Eq. 69, 30 Atl. 896.

[91] Marshall v. Marshall, 11 Colo. App. 505, 53 Pac. 617.

[92] State v. Northrop, Supra.

[93] Branch v. Bulkley, Supra.

property, is that when in doubt they can go to a court of equity for instruction and guidance. Once they secure a judicial construction of the trust, and act on the advice of the court, they will be protected in such action. This principle is well illustrated in Thorn v. De Breteuil.[94] In this case one William T. Garner, the owner of cotton mills and print works directed in his will that his mills and print works be conducted after his death according to a trust agreement which was made a part of his will. Originally there were four trustees; upon the death of three of them, the survivor, Mr. Thorn brought an action as the sole surviving executor and trustee under the will, to obtain a judgment which should finally settle his accounts, discharge him from all further responsibility, and permit him to resign his office of trust in favor of a certain trustee named. He joined as parties defendant the three daughters of William T. Garner, deceased, who were his only children, their husbands, and their children.

The principal question involved in the case was one of estoppel. The trustees at different periods filed their reports which were approved. At one time prior to the present action, they asked for a judicial construction of the will, and for instruction as to their powers and duties. It was then implied in the judgment rendered that the trustees were to carry on the business in the manner directed in the will; further, that all profits and gain not otherwise appropriated be added to the working capital of the estate. The question of estoppel as it arose in this case is of vital interest in considering the trust question for the reason that the trustees were upheld in their acts when they followed the instructions

[94] 179 N. Y. 64, 71 N. E. 470.

of the court. It was upon this theory that the upper court sustained the actions of the trustees in adding the profits gathered from years of business to the capital—although this addition of profits to the capital was in violation of a statute against accumulation. The trustees sought judicial knowledge as to their powers and duties; they acted on the instructions of the court; the upper court sustained them in such action. The court, in passing on the doctrine of estoppel and the other questions raised, in substance, said:

The well-settled general rule of estoppel, as stated in Pray v. Hegeman,[94a] and as repeated more recently in Reich v. Cochran,[95] is "that the estoppel in a former judgment extends to every material matter within the issues which was expressly litigated and determined, and also to those matters which although not expressly determined are comprehended and involved in the thing expressly stated and decided, whether they were or were not actually litigated or considered. It is not necessary to the conclusiveness of a former judgment that issue should have been taken upon the precise point controverted in the second action. Whatever is necessarily implied in the former decision is, for the purpose of the estoppel, deemed to have been actually decided." In Herman on Estoppel,[96] a general rule is deduced from a number of cases that the principle of res adjudicata, which is a phase of estoppel by record, "not only embraces what actually was determined, but also extends to every other matter which, under the issues, the parties might have litigated in the case; to everything within the knowledge of the parties which might have been set up as a ground of relief or defense. This

[94a] 98 N. Y. 351.
[95] 151 N. Y. 122, 45 N. E. 367, 37 L. R. A. 805, 56 Am. St. Rep. 607.
[96] Sec. 125.

latter statement may be thought rather broadly made, but it is not out of harmony with the reason for the rule of finality in judgments, namely, the policy and expediency of accomplishing the ends of justice by a single decision upon the rights of parties. The rule has also been stated, upon the authorities, rather appropriately to this case, in this wise: That the estoppel of a judgment by a court of competent jurisdiction extends to those matters which, though not expressly determined, are comprehended and involved in the thing expressly stated and decided. Hence it is not necessary to the conclusiveness of the former judgment that issue should have been taken upon the precise point controverted in the second action."[97]

Was not the rule satisfied, in its essential and reasonable requirements, in this case? Is there room for doubt that the precise point now raised by the daughters of the testator was comprehended in what was decided in the construction suit? Upon that judgment, in 1879, the trustees have proceeded with the business, accounting for the accumulation of the surplus income of the estate as part of the capital in their hands, and receiving the apparent approval of the beneficiaries and the express approval of the court. I do not think the ends of justice would be promoted by allowing the claims of the adult defendants.

I should say that the point of this estoppel by record is not in this: that an issue was raised by way of suggestion in the complaint or of allegation in the answer in the construction suit as to the validity or invalidity of the direction in the second clause of the will; but it is in this: that the trust in the will presented a dominating or conspicuous feature

[97] Am. & Eng. Ency. of Law, vol. 24, p. 766.

in the aspect discussed, which the judgment in the construction suit must have determined or impliedly did determine, and therefore was to be regarded as accepted by the parties in interest as the chart of the trustees' powers and duties. The decision of this court in Pray v. Hegeman, supra, is an authority much in point. Hegeman was executor and trustee under the will of Austin D. Moore, and testator's son, a beneficiary of a trust created thereunder, had brought an action against Hegeman to have the trust declared invalid as unlawfully suspending the power of alienation, and to recover the share of the estate and the accumulations. The judgment went against the plaintiff, and adjudged the trust provision to be valid. Whether the will controverted the statute against accumulations was a question not specifically raised, nor specifically passed upon by the judgment. That case was affirmed in this court.[98] Subsequently Pray, a judgment creditor of the younger Moore, brought an action against Hegeman, the executor and trustee, and Moore, to reach the accumulation in Hegeman's hands, as belonging to Moore. This court held,[99] upon a first trial that the accumulation directed by the will was illegal; but, because of the imperfect presentation of the facts, a new trial was ordered. Upon the second trial a son of Moore, an infant, set up as a bar the prior judgment in Moore v. Hegeman, and a judgment was had that the prior judgment pleaded constituted an estoppel. When the case reached this court again, the judgment was sustained,[100] and in the opinion delivered by Judge Andrews, the general rule was stated as I have quoted it above. Judge Andrews observed that "the first action was, in general terms, to recover the whole trust estate on the ground

[98] 72 N. Y. 376.
[99] 92 N. Y. 508.
[100] 98 N. Y. 351.

that the entire trust was void. The present action is to recover the accumulations on the ground that the trust, though otherwise valid, was, as to the accumulations, void. If the plaintiff in the first action was entitled to a judgment establishing his right to the accumulations, then manifestly this action was for the same cause. It must be true, as a general principle, that subordinate rights or questions which are branches of a larger right or question put in issue, and which under the pleadings may be determined, and as to which relief may be given in the action, although the principal or main relief is denied, are determined by a judgment on the merits denying all relief." The principle of the decision as to the estoppel worked by the previous judgment was in this: that whatever is necessarily implied in the former decision is, for the purpose of the estoppel, deemed to have been actually decided, and that it is not necessary to the conclusiveness of the former judgment that issue should have been taken upon the precise point controverted in the second action. That was the situation in this action. When the executors of Garner asked for a judicial construction of his will, and that their powers and obligations and the rights of the children should be declared and adjudged, it was implied in the judgment rendered that they were authorized to carry on the business in the manner directed in the will, and that the direction to add all profits and gains, not otherwise appropriated, to the working capital of his estate was valid.

To apply a test suggested by Judge Andrews in Pray v. Hegeman, if the defendants in the suit brought for the construction of Garner's will had appealed from the judgment and had raised the point that the direction as to the addition of profits to capital violated the statutes against accumulations, would not the appellate courts have been bound to

reverse the judgment so far as it determined that the executors should carry on the testator's business as his will directed it to be done; there was in fact such an adjudication bearing upon the point now raised as to have rendered the judgment vulnerable upon appeal. But if that be so, then it is no unreasonable stretch to apply the rule of estoppel to this controversy. It seems to me that this case is brought well within the line of authorities to which counsel directed our attention, and which determine the conclusiveness of the estoppel of a prior judgment by the test of whether the issue in the subsequent action was involved upon the prior trial, and was expressly or impliedly determined as material to the judgment. When all is considered, it seems to be an irresistible conclusion that, if the judgment of 1879 had any effect, it had that of giving authority to the executors to follow the testator's directions. The question stood plainly out in the will and in the pleadings. Knowledge of the statutes was chargeable to the court and to the guardian of the infant defendants. The acts of the plaintiff and of his former associates in the trust have not been questioned by those concerned in all the years intervening between the first judgment of 1879, and the commencement of this action in 1899. The testator's children, though infant defendants, were as much barred by the judgment in the construction suit as though they were adults.[1] These infant defendants, the grandchildren of the testator, were barred by that judgment equally with their mothers. Their interests were purely contingent and the court had before it all necessary parties having vested

[1] Matter of Hawley, 100 N. Y. 206, 3 N. E. 68. Matter of Tilden's Ex'rs., 98 N. Y. 434.

interests, and through them these infant defendants were represented.[8]

If the bar of an estoppel by record existed, it will not do to lift it through the suggestion that the accumulations are separable from the capital of the estate in the plaintiff's hands. The claims of these adult defendants were barred, or they were not. Not only the legal rule of finality operated, but equitable considerations of possible prejudice to remaindermen or of possible prejudice to the investment of the trust estate, militate against our holding otherwise.

All other questions have been properly adjudged and I advise that the judgment of the Appellate Division be reversed in so far as it modified the judgment of the Special Term, and that that judgment be affirmed, with such modification, however, in its recitals, as that it shall adjudge that the adult defendants were estopped and barred from claiming that the provisions of the will were invalid, or that the daughters of the testator were severally entitled to receive any portion of the fund in the plaintiff's hands which represents the accumulations made by the executors and trustees.

[8] Pray v. Hegeman, 98 N. Y. 351; Gifford v. Hart, 1 Sch. & Lef. 386.

CHAPTER XVII.

TAXES.

181—*Trust Not Subject to Tax Under Corporation Act.*

The physical assets of a trust are subject to taxation the same as any other property; but the corporation, in addition to this tax, is subject to a capital stock tax, a franchise tax, and special taxes under corporate acts. It has been said that "in the matter of taxation the advantage is decidedly with the business trust. The corporation must pay an organization tax, a property tax, a franchise tax, a state and federal capital stock tax, and a state and federal income tax."[24] The trust as such is not subject to taxation under a law providing for a corporate tax; this doctrine was expressed by the United States Supreme Court in the case of Eliot v. Freeman.[8] In this case the Cushing Real Estate Trust was organized for the purpose of purchasing, improving, holding and selling lands and buildings in Boston. The government sought to tax this trust and another trust known as the Department Store Trust under an act which provided for "the doing of business by corporations, joint-stock companies or associations, now or hereafter organized under the laws of the United States or of any state or territory" In construing this tax act in reference to trusts the court said:

"The pertinent question in this connection is: are these trusts organized under the laws of the state? As we have con-

[24] Thompson Business Trusts, 38.

[8] 220 U. S. 178, 31 Sup. Ct. 360, 55 L. Ed. 424.

strued the corporation tax act in Flint v. Stone Tracy Company[31] the tax is imposed upon doing business in a corporate or quasi corporate capacity; that is, with the facility or advantage of corporate organization. It was the purpose of the act to treat corporations and joint-stock companies similarly organized, in the same way, and assess them upon the facility in doing business which is substantially the same in both forms of organization. Joint-stock organizations are not infrequently organized under the statute laws of a state, deriving therefrom, in a large measure, the characteristics of a corporation.

The language of the act, "now or hereafter organized under the laws of the United States," etc., imports an organization deriving power from statutory enactment. The statute does not say under the law of the United States, or a state, or lawful in the United States or in any state, but is made applicable to such as are organized under the laws of the United States, etc. The description of the corporation or joint-stock association as one organized under the laws of a state at once suggests that they are such as are the creation of statutory law from which they derive their powers and are qualified to carry on their operations.

A trust of the character of those here involved can hardly be said to be organized within the ordinary meaning of that term; it certainly is not organized under statutory laws as corporations are. The difference between joint-stock associations at common law and those organized under statutes is well recognized (2 Cook, Corp. Sec. 505): "There is an essential difference between a joint-stock company as it exists at common law and a joint-stock company having extensive

[31] 220 U. S. 107, 55 L. Ed. 389, 31 Sup. Ct. 342.

statutory powers conferred upon it by the state within which it is organized. The latter kind of joint-stock companies is found in England and in the State of New York. To such an extent have these statutory powers been conferred on joint-stock companies that the only substantial difference between them and corporations is that the members are not exempt from liability as partners for the debts of the company."

The two cases now under consideration embrace trusts which do not derive any benefit from and are not organized under the statutory laws of Massachusetts. Joint-stock companies of the statutory character are not known to the laws of that commonwealth.[4] These trusts do not have perpetual succession but end with lives in being and twenty years thereafter.

Entertaining the view that it was the intention of congress to embrace within the corporation tax statute only such corporations and joint-stock associations as are organized under some statute, or derive from that source some quality or benefit not existing at the common law, we are of the opinion that the real estate trusts involved in these two cases are not within the terms of the act. In that view the decrees in both cases will be reversed and the same remanded to the Circuit Court of the United States for the District of Massachusetts, with directions to overrule the demurrers, and for further proceedings consistent with this opinion."

182—*Trust Not Subject to Capital Stock Tax.*

A trust in its aggregate may be represented by a certain number of beneficial interests, and these interests may be

[4] Ricker v. American Loan & T. Co., 140 Mass. 346, 5 N. E. 284.

evidenced by transferable certificates; where this is true the trust as such is not subject to a corporation act which provides for a capital stock tax. This principle is well set forth in the case of The National Express Company;[4i] in this case the express company—a joint-stock association—was taxed on its capital under an act providing for a capital stock tax on corporations. The company contended that it was not a corporation and therefore not subject to a capital stock tax; this view was upheld in the lower and sustained by the Supreme Court. The ruling on this question is in substance as follows:

The National Express Company was taxed upon its capital on the ground that it had become a corporation within the meaning of the provision of the Revised Statutes which enacts that "all money or stock corporations deriving an income or profit from their capital, or otherwise, shall be liable to taxation on their capital in the manner hereinafter prescribed. (1 Rev. Stat. pt. 1, chap. 13, title 4, Section 1.) The company was formed as a joint-stock company or association in 1853 by a written agreement of eight individuals with each other, the whole force and effect of which, in constituting and creating the organization, rested upon the common-law rights of the individuals and their power to contract with each other. The relation they assumed was wholly the product of their mutual agreement and dependent in no respect upon the grant or authority of the state. It was entered into under no statutory license or permission, neither accepting, nor designed to accept, any franchise from the sovereign, but founded wholly upon the in-

[4i] People, ex rel. Winchester v. Coleman, 133 N. Y. 279, 31 N. E. 96, 16 L. R. A. 183.

dividual rights of the associates to join their capital and enterprise in a relation similar to that of a partnership. A few years earlier the legislature had explicitly recognized the existence and validity of such organizations founded upon contract and evolved from the common law rights of citizens; Laws 1849, Chap. 258. That act provided that any joint-stock company or association which consisted of seven or more members might sue or be sued in the name of its president or treasurer, and with the same force and effect so far as the joint property and rights were concerned, as if the suit should be prosecuted in the names of the associates; but the act explicitly disclaimed any purpose of converting the joint-stock associations, recognized as existing, into corporations by a section prohibiting any such construction; Section 5. In 1851 the act was amended in its form and application, but in no respect material to the present inquiry.

There is no doubt, therefore, that when the company was formed and went into operation, the law recognized a distinct and substantial difference between joint-stock companies and corporations, and never confused one with the other; and the existing statute which taxed the capital of corporations had no reference to or operation upon joint-stock companies or associations. But, two things have since occurred. The legislature, while steadily preserving the distinction of names, has, with equal persistence, confused the things by obliterating substantial and characteristic marks of difference, until it is now claimed that the joint-stock associations have grown into and become corporations by force of the continued bestowal upon them of corporate attributes. It is said, and very probably correctly said, that the legislature may create a corporation, without explicitly declaring it to be such, by the bestowal of a corporate franchise or corporate attributes,

and the cases of banking associations are referred to as instances of actual occurrence.[5] It is added that such result may happen even without the legislative intent and because the gift of corporate powers and attributes is tantamount to a corporate creation. It is then asserted that a series of statutes beginning with the act of 1849, has ended in the gift to joint-stock associations of every essential attribute possessed by and characteristic of corporations (laws 1853, chap. 53; laws 1854, chap. 245; laws 1867, chap. 289); that the lines of distinction between the two, however, far apart in the beginning, have steadily converged, until they have melted into each other and become identical; that every distinguishing mark and characteristic has been obliterated; and no reason remains why joint-stock associations should not be, in all respects, treated and regarded as corporations. Some of this contention is true; the case of People v. Wemple[6] shows very forcibly how almost the full measure of corporate attributes has, by legislative enactment, been bestowed upon joint-stock associations, until the difference, if there be one, is obscure, elusive, and difficult to see and describe. And yet the truth remains that all along the line of legislation the distinctive names have been retained as indicative and representative of a difference in the organizations themselves.

As recently as the acts of 1880 and 1881, which formed the subject of consideration in the Wemple case, the legislature, dealing with the subject of taxation and desiring to tax business and franchises, imposed the liability upon "every corporation, joint-stock company, or association whatever,

[5] Thomas v. Dakin, 22 Wend. 9; Bank of Watertown v. Watertown, 25 Wend. 686; People v. Niagara County, Supra, 4 Hill 20.

[6] 117 N. Y. 77, 6 L. R. A. 303, 52 Hun. 434.

now or hereafter incorporated or organized under any law of this state." It is significant that the words "or organized" were inserted by amendment, and evidently for the understood reason that joint-stock companies could not properly be said to be "incorporated" but might be correctly described as "organized" under the laws of the state. This persistent distinction in the language of the statutes I should not be inclined to disregard or treat as of no practical consequence, when seeking to arrive at the true intent and proper construction of the statute, even if I were unable to discover any practical or substantial difference between the two classes of organizations upon which it could rest or out of which it grew; for the distinction so sedulously and persistently observed would strongly indicate the legislative intent, and so the correct construction.

But I think there was an original and inherent difference between the corporate and joint-stock companies known to our law, which legislation has somewhat obscured but has not destroyed, and that difference is the one pointed out by the learned counsel for the respondent, and which impresses me as logical, and well supported by authority. It is that the creation of the corporation merges in the artificial body and drowns in it the individual rights and liabilities of the members, while the organization of a joint-stock company leaves the individual rights and liabilities unimpaired and in full force. The idea was expressed[7] by the statement that the corporators lost their individuality and merged their individual characters into one artificial existence; and upon these authorities a corporation is defined, on behalf of the respondents,

[7] Supervisors of Niagara Co. v. People, 7 Hill 512; Gifford v. Livingston, 2 Denio 380.

to be "an artificial person created by the sovereign from natural persons and in which artificial person the natural persons of which it is composed become merged and nonexistent."

I am conscious that legal definitions invite and provoke criticism, because the instances are rare in which they prove to be perfectly accurate; and yet this one offered to us may be accepted, if it successfully bears some sufficient test. In putting it on trial we may take the nature of the individual liability of the corporators on the one hand and of the associates on the other for the debts contracted by their respective organizations, as a sufficient test of the difference between them, and contrast their nature and character. It is an essential and inherent characteristic of a corporation that it alone is primarily liable for its debts because it alone contracts them, except as that natural and necessary consequence of its creation is modified in the act of its creation by some explicit command of the statute which either imposes an express liability upon the corporators in the nature of a penalty or affirmatively retains and preserves what would have been the common law liability of the members from the destruction involved in the corporate creation. In other words, the individual liability of the members, as it would have existed at common law, is lost by their creation into a corporation, and exists thereafter only by force of the statute upon some new and modifying conditions, to some partial or changed extent, and so far preventing by the intervention of an express command the total destruction of individual liabilities which otherwise would flow from the inherent effect of the corporate creation. The penalties sometimes imposed are of course new statutory liabilities which never, at common law, rested upon the individual members. The retained liability occasionally established is in the nature and a parcel of such original liability[8]

[8] Rogert v. Decker, 131 N. Y. 490.

but is retained by force of the express command of the statute, and in that manner saved from the destruction which otherwise would follow the simple creation of the corporation.

Ordinarily these individual liabilities exist upon other than common-law conditions, and make the corporators rather sureties or guarantors of the corporation than original debtors, since in general their ability arises after the usual remedies against the corporation have been exhausted. But, where that is not so, the invariable truth is that the creation of the corporation necessarily destroys the common-law liability of the individual members for its debts, and requires at the hands of the creating power an affirmative imposition of new personal liabilities, or a specific retention of old ones from the destruction which would otherwise follow. Exactly the opposite is true of joint-stock companies. Their formation destroys no part or portion of their common-law liability for the debts contracted. Those debts are their debts, for which they must answer, permission to sue their president or treasurer is only a convenient mode of enforcing that liability but in no manner creates or saves it. The statute of 1853 did interfere with it; that act required, in the first instance, a suit against the president or treasurer, and so a preliminary exhaustion of the joint property. But that act was modal, and determined the procedure, it suspended the common-law right, but recognized its existence. It has been held that the associations were not corporations, but mere partnership concerns.[9] Even that mode or procedure has been modified by the Code, (Secs. 1922, 1923) so that the creditor, at his option, may sue the associates without first bringing his action against the president or treasurer.

These last and quite recent enactments show that the legis-

[9] Witherhead v. Allen, 4 Abb. App. Dec. 628.

lative intent is still to preserve and not destroy the original difference between the two classes of organizations; to maintain in full force the common-law liability of associates, and not to substitute for it that of corporators; and, preserving in continued operation that normal and distinctive difference, to evince a plain purpose not to merge the two organizations in one, or destroy the boundaries which separate them. That intent, once clearly ascertained, determines the construction to be adopted, and may be the only reliable test in view of the power of the state to clothe one organization with all the attributes of the other. The drift of legislation has been to lessen and obscure the original and characteristic difference. On the one hand, corporations have been created with positive provisions retaining more or less the individual liability of the members, and on the other, the joint-stock company has been clothed with most of the corporate attributes; but enough of the original difference remains to show that our legislation not only carefully preserves the distinction of names, but sufficient, also, of the original difference of character and quality to disclose a clear intent not to merge the two. We may thus see upon what the legislative intent to preserve them as separate and distinct is founded, and what distinguishing characteristics remain. The formation of the one involves the merging and destruction of the common-law liability of the members for the debts, and requires the substitution of a new, or retention of the old, liability by an affirmative enactment which avoids the inherent effect of the corporate creation; in the other the common-law liability remains unchanged and unimpaired and needing no statutory intervention to preserve or restore it. The debt of the corporation is its own debt, and not that of its members; the debt of the joint-stock company is the debt of the associates, however enforced. The creation of the corporation merges and

drowns the liability of its corporators; the creation of the stock company leaves unharmed and unchanged the liability of the associates. The one derives its existence from the contract of the individuals; the other, from the sovereignty of the state. The two are alike, but not the same. More or less they crowd upon and overlap each other, but without losing their identity; and so, while we cannot say that the joint-stock company is a corporation, we can say that a joint-stock company is a partnership with some of the powers of a corporation.[10] Beyond that we do not think it is our duty to go.

183—*Trust Not Subject to Franchise Tax.*

The corporation comes into being and operates by reason of a franchise granted by the state; the trust, however, comes into existence as a matter of right under contract of individuals. It neither exercises nor enjoys any franchise or special privilege from the state and for that reason there is no basis for a franchise tax being assessed against it. This principle is discussed and amplified in the case of Gleason v. McKay.[11] This case is recognized as a leading one on this subject, it has been cited and the doctrine expressed therein read into the decisions in a great number of states. It is reported herewith in substance as follows:

This was an action by the treasurer of the Commonwealth against the trustee of the McKay Sewing Machine Association, to recover a tax assessed upon said association for the year 1879, in pursuance of the St. of 1878, c. 275. The case was submitted to the Superior Court, and, after judgment for the defendant, to this court on appeal on agreed facts. Previous

[10] Van Aernam v. Bleistein, 102 N. Y. 470, 4 Cent. Rep. 635.

[11] 134 Mass. 419.

to May 10, 1866, Gordon McKay had acquired, by invention, assignment or license, interests in letters patent of the United States for improvements in machinery for sewing the soles of boots and shoes to the vamps, and had been carrying on the business of manufacturing machines under these letters patent, and licensing shoe manufacturers to use them. From the proceeds of the business, he had purchased land in Lawrence and built a machine shop on it for the manufacture of such machines and accumulated some personal property. The legal title in the business and in all the property, both real and personal, including the interests in the letters patent, was in himself; but other persons were equitably interested in various proportions.

On May 10, 1866, McKay executed an instrument under seal, in which, after reciting the foregoing facts, he declared that he had held and should continue to hold the business and property in trust for the benefit of all persons who were or might become interested therein, upon the terms and conditions therein set forth. Upon the execution of this instrument by McKay, all the persons then interested in the property or business signed an agreement in the following terms: "In consideration that the said Gordon McKay has agreed and does hereby bind himself and agree to deliver to each and every party having an interest in the property set forth in the foregoing certificate and declaration of trust, a certificate and declaration similar to the foregoing expressing the several interests of each party, in case all of the persons interested in said property shall sign this agreement, we do hereby severally bind ourselves and agree to receive from said McKay such certificate and declaration of trust as the sole evidence of our respective interests in the above described property; and upon the receipt thereof, any other certificate or evidence of title which we may hold to said property shall become cancelled and void and the same shall be

surrendered to him, the said McKay." Each person then interested received a certificate signed by the trustee, certifying that he was the owner of a certain number of shares "in the property of the McKay Sewing Machine Association" and the "shares are transferable by an assignment in writing on this certificate, and a surrender of this certificate to the trustee."

After the execution of the papers and issue of the certificates, the shareholders held a meeting on May 28, 1866, as provided for by the declaration of trust, and chose an executive committee and adopted by-laws for the regulation of the business of the association. Since said date the business of the association was conducted by its executive committee under the provisions of said declaration and by-laws, McKay holding the legal title of all its property as trustee under said declaration, the title of the property never having passed from him. The place of business of the association was in Boston, except that it had a factory in Lawrence for the manufacture of machines and tools. Except its machine shop in Lawrence and the tools and machinery connected therewith, the property of the association and the value of its shares consisted chiefly of its interests in the letters patent.

Its income was chiefly derived from license fees received from licensees of its machines, and the net amount of this income was divided from time to time, generally quarterly, among its members in proportion to their respective shares or interests. Its machines were all leased under a form of lease, the legal title to them remaining in McKay as trustee. On May 1, 1879, there were 1216 of these machines in the hands of licensees distributed throughout the United States; and the interest of McKay, trustee, and of said association therein, exclusive of the interest of the lessees, was taxed to said trustee for that year in Boston at the rate of $1 per machine. The total

value of the machines at that date—May 1, 1879—was on an average $100 for each machine which had been paid by each lessee on the delivery of the machine to him. By a provision in all of said leases, the lessee upon the termination of the lease, if he had complied with its terms, was entitled to the machine absolutely, upon the payment of $1 to the trustee.

Whenever a member sold his shares, or any of them, new certificates were issued to the purchaser, and such purchasers thereupon became members of the association. Said shares were frequently sold and such sales reported at auction sales in Boston, and were subject of transfer upon assignment of certificates of shares as set forth in said certificates; and upon such assignment, the assignee was entitled to receive new certificates and to demand and receive of the association his proportionate share of the new profits of the association under said declaration and by-laws. Such shares were held by the person holding the certificate thereof, free from the control of any other person, and were subject to no restrictions or conditions whatever except such as were set forth in said certificate and declaration of trust.

McKay, as trustee of said association, was taxed for its real estate, machinery and tools in Lawrence for the year 1879, as well as in all previous years, and the tax was duly paid; said real estate was assessed at $63,500 and said machinery and tools at $71,216. He was also taxed in said year for said association, on office furniture, money on hand, book accounts and interest in said machines in the hands of licensees, all valued at $52,291.99 and upon which he duly paid the assessed tax, amounting to $653.75. This valuation did not include the interests in the letters patent held by him, it being contended by the trustee that letters patent of the United States were not subject to taxation.

The tax sought to be recovered in this action, $14,253.33, was assessed upon the aggregate value of the shares of the association on May 1, 1879 as ascertained by the tax commissioner in pursuance of the provisions of the St. of 1865, c. 283, after deducting therefrom only the value of said real estate, machinery and tools taxed at Lawrence, said assessed valuation being $1,115,284. Upon notice of said taxation, the said trustee, in behalf of the association, duly applied to the board of appeal for a correction of said tax upon the ground that said valuation and assessment included the interest in said letters patent and also the personal property taxed in Boston, as it did in fact, at the same time claiming that no tax whatever was assessable against said trustee or association. Upon the hearing, the foregoing facts appeared, but the board of appeal declined to reduce or alter the amount of said valuation or assessment.

Morton, C. J. "The principal question in this case is whether the St. of 1878, c. 275, as applied to the defendant, is constitutional. The first section of the statute provides that 'chapter 283 of the acts of the year 1865 and the acts in amendment thereof, are hereby extended to apply, so far as applicable, to companies, copartnerships and other associations having a location or place of business within this commonwealth, in which the beneficial interest is held in shares which are assignable without consent of the other associates specifically authorizing such transfer. And the tax provided for in said chapter 283 shall be paid by such company, copartnership or association, upon the aggregate value of the shares of said capital stock in the manner provided in said chapter for taxes upon corporations.'

The power of taxation, using the word in its generic sense as including all rates and impositions laid or levied upon the people, is conferred upon the legislature by the Constitution, and

is to be held and exercised subject to the limitations imposed by the Constitution.[12] The legislature is given the power "to impose and levy proportional and reasonable assessments, rates and taxes, upon all the inhabitants of, and persons resident and estates lying within the said commonwealth" and also power "to impose and levy reasonable duties and excises upon any produce, goods, wares, merchandise and commodities whatsoever, brought into, produced, manufactured, or being within the same." Const. Mass. c. 1, art. 4.

It is clear that the statute in question was not intended to lay a tax upon property within the first of these clauses. It does not purport to do this. It merely extends to certain copartnerships and associations the provisions of the St. of 1865, c. 283, which chapter has been held to levy an excise upon corporate franchises and not to lay a tax on property, and which chapter can be sustained as constitutional only upon the ground that it levies an excise.[13] Regarded as a tax on property, the tax we are considering would be invalid because not proportional; it would be an imposition upon certain property at a rate different from that to which other property in the commonwealth is subject. But, as we have said, it does not purport to be a tax on property. In levying an imposition under this statute no inquiry is made as to what property liable to taxation, any copartnership or other association has which comes within its terms. Such property remains liable to taxation under the general laws. This imposition is based upon the aggregate value of the shares of said capital stock. Such shares, if they can be said to be property, are not property of the copartnership or association which is taxed, but of the individual part-

12 Oliver v. Washington Mills, 11 Allen 268.

13 Murray v. Berkshire Ins. Co., 104 Mass. 586; Commonwealth v. Hamilton Mfg. Co., 12 Allen 298.

ners or shareholders. It is very clear that this was intended as an excise upon some franchises or privileges sought to be held by the copartnerships or associations in supposed analogy to the franchises of corporations. And the question is whether this imposition can be upheld as such excise within the second clause of the Constitution cited above. In this clause, there are two limitations upon the power of the legislature in imposing excises. They must be reasonable and they must be excises upon some produce, goods, wares, merchandise, or commodities, brought into, produced, manufactured, or being within the commonwealth.

It will not be seriously contended that the privileges or rights which are taxed by this statute can be properly described as either produce, goods, wares or merchandise. Do they fairly come within the terms "commodities" in the sense in which it is used in the Constitution? Ever since the adoption of the Constitution, the legislature in its practice and this court in its adjudications, have given a very broad and extensive meaning to this term. It has been repeatedly held that corporate franchises enjoyed by grant from the government are commodities and subject to an excise. So with corporate franchises granted by a foreign government, which by comity are permitted to be exercised within this commonwealth. So where the legislature has thought, upon considerations of public policy, that certain occupations or callings of a public or quasi public character should be carried on under governmental regulation, it has been usual to impose a reasonable fee for a license.[14]

This imposition is clearly not in the nature of a license fee,

[14] Portland Bank v. Apthorp, 12 Mass. 252; Commonwealth v. People's Five Cents Sav. Bk., 5 Allen 428; Commonwealth v. Hamilton Mfg. Co., Supra; Commonwealth v. Cary Imp. Co., 98 Mass. 19; Connecticut Ins. Co. v. Commonwealth, 133 Mass. 161.

as far as practicable be raised by the equal taxation of the people.

We are therefore of opinion that the St. of 1878, c. 275, so far as it applies to the defendant, is unconstitutional; judgment for the defendant."

184—*Stamp Tax.*

A trust may or may not have its estate represented by a certain number of beneficial interests; and it may or may not have certificates to show the ownership of the beneficial interests. The trust agreement may give the number of beneficial interests representing the trust estate and also the names and number of the beneficial interests owned by the several individuals; or the trust may have a beneficial interest record book in which are recorded the names and number of interests owned by individuals; but if the trust issues certificates, they are subject to the stamp tax act, for the theory of this act is to provide a revenue from certificates irrespective of whether they are issued by a corporation, association, or trust. This question was determined in the case of Pepperell Manufacturing Company, a trust,[16] which is in the main as follows:

Brown, District Judge. "We are of the opinion that, on the original issue of the certificates of shares of the Pepperell Manufacturing Company, a manufacturing company organized in the form of a trust under the common law, and deriving none of its rights, qualities or benefits from any statute, there was required by the provisions of section 5, schedule A of the War Tax Law, so called, approved October 22, 1914 (38 Stats. pt. 1, pp. 745, 753, 759, c. 331) a stamp tax of five cents on each $100 of face value or fraction thereof.

[16] Malley v. Bowditch, 259 Fed. 809, 7 A. L. R. 608.

By agreement and declaration of trust it was provided: "The capital of this trust shall be seven million six hundred and sixty-eight thousand dollars ($7,668,000) divided for the purpose of issuing certificates into 76,680 shares of the par value of one hundred dollars each." There was thus provided a share capital as a basis for the issue of transferable certificates evidencing a proportional interest therein and carrying with them certain rights while the company is a going concern and in its winding up.

The defendants in error, the trustees, contend that these certificates are not "certificates of stock." The word "stock" however, is to be interpreted in connection with the accompanying words of the statute, "association, company, or corporation." It is a term not peculiar to corporations, but a term equally applicable to the share capital or fund created by or in accordance with an agreement for the formation of an unincorporated association or company. The contention of the trustees that "legislative action is essential to the creation of capital stock" is erroneous. If there is a distinction between the "capital" and the "capital stock" of corporations in that the capital stock is fixed by the charter of a corporation but that the capital used in its business may be either larger or smaller, there may be a like distinction between the joint stock or share capital or a partnership or association—as fixed by the agreement of the partners—and the full amount of its property.[17]

An "association" or "company" equally with a corporation,

[17] Lindley on Partnership (8th Eng. Ed.), 382 et seq. In Bankruptcy Act Aug. 19, 1841, c. 9, Sec. 14, 5 Stat. 448, and Act March 2, 1867, c. 176, Sec. 36, 14 Stat. 534, the term 'joint stock' was used to describe partnership assets. Collier on Bankruptcy (11th Ed.), pp. 1550, 1535. Berthold et al. v. Goldsmith, 24 How. 541, 16 L. Ed. 762 the term 'capital stock' was used in the same sense.

may have a share capital distinct from its actual capital or property, irrespective of whether it is formed in a state without regulating statutes or in a state where by statute it is regulated and given some of the characteristics of a corporation. The present statute by the use of the terms "association" and "company" covers those formed under the common law as well as those formed under or regulated by statute. It seems to us clear that the words "certificates of stock" contain no implication of an intent to exclude common-law associations or companies. A certificate evidencing a transferable share or shares in the share capital of a manufacturing company, whether incorporated, quasi incorporated, or wholly unincorporated, is properly described as a "certificate of stock."

By agreement the certificates in question were issued as evidence of shares of a fixed capital, divided into a fixed number of shares of the par value of $100 each. We are called upon to apply a statute imposing stamp taxes on documents of a certain class, which assumes that these documents may be issued not only by corporations, but by associations and companies. These may have this in common—a share capital of fixed amount. Whether the share capital is fixed by agreement or under statutory authority seems immaterial, for the tax is not a franchise tax or a corporation tax, but a stamp tax or document tax.

The difference between corporations and unincorporated associations being considered immaterial to the imposition of a stamp tax on documents, the different modes of realizing upon the shares of incorporated or unincorporated companies by the certificate holders must also be regarded as immaterial. Having that feature of resemblance which the statute fixes upon as the test of the imposition of a stamp tax, the difference between these different bodies which are named in the statute has be-

come immaterial to the question before us. The suggestion of constitutional difficulties in adopting the construction for which the collector contends, and which we think right, does not seem of weight. In involves "no distinction founded upon an immaterial difference between two kinds of partnerships," since the stamp tax is contingent upon the original issue of "certificates of stock," just as a stamp tax on checks is contingent upon the issuing of checks.

A stamp tax on documents discriminates between those who do and those who do not issue documents; and a distinction between unincorporated companies and associations which do and those which do not issue certificates of shares of stock is not unreasonable, nor founded upon an immaterial difference between two kinds of partnerships.[18] Nor do we regard it useful to consider whether the right of the certificate holder or shareholder is a chose in action or in the nature of a chose in action, or an equitable interest in property. The certificate is but a muniment of title—documentary evidence of ownership—and not the share itself. The thing taxed is not a chose in action, though it may be evidence of it. In a remote sense both a share of corporate stock and a certificate of a share in an unincorporated company may be said to represent an interest in property. It is equally true that both may represent an interest in a share of capital fixed in amount, whether fixed by statute or by agreement.

185—*Franchise Tax Distinguished from Stamp Tax.*

In Eliot v. Freeman,[19] construing the corporation tax law

[18] Thomas v. United, 192 U. S. 363-71, 24 Sup. Ct. 305, 48 L. Ed. 481; Hatch v. Reardon, 204 U. S. 152-8-9, 27 Sup. Ct. 188, 51 L. Ed. 415, 9 Ann. Cas. 736.

[19] 220 U. S. 178, 31 Sup. Ct. 360, 55 L. Ed. 424.

(Act Aug. 5, 1909, c. 6, 36 Stat. 11) it was held that the tax was imposed upon doing business in a corporate or quasi corporate capacity. But that case is clearly distinguishable from the present case since the present statute does not impose a franchise tax, but imposes a stamp tax upon various kinds of documents which may be issued by companies either incorporated or quasi incorporated, "or for or in respect of the vellum, parchment, or paper upon which such instruments, matters, or things, or any of them are written or printed," etc. See section 5, 38 Stat. pt. 1, p. 753. In interpreting the statute we find no sufficient reason for limiting the terms "association" and "company" to those which derive their powers from legislation.

We have examined also the opinion of the Supreme Court in Crocker et al. v. Malley,[80] reversing the judgment of this court. In that case the Supreme Court found that "The declaration of trust on its face is an ordinary real estate trust of the kind familiar in Massachusetts, unless in the particular that the trustees receipt provides that the holder has no interest in any specific property and that it purports only to declare the holder entitled to a certain fraction of the net proceeds of the property when converted into cash and meantime to income." It was stated, however, in that case that: "The function of the trustees is not to manage the mills, but simply to collect the rents and income of such property as may be in their hands."

Under the present declaration of trust it is provided that the name of the trust shall be Pepperell Manufacturing Company, and the trustees may be so designated and in that name the trustees shall, so far as practicable, conduct the business of the trust; that the trustees shall employ and use the trust property

[80] 249 U. S. 223, 39 Sup. Ct. 270, 63 L. Ed. 573, 2 A. L. R. 1601.

and assets in the carrying on of the business of manufacturing textile or other fabrics, etc. This is essentially different from an ordinary real estate trust of the kind familiar in Massachusetts. If, under the decision of the Supreme Court, there may be doubt whether the term "association" is applicable, there seems no ground for serious doubt of the applicability of the term "company" used in the statute and made a part of the name and description of those persons who are to conduct the manufacturing business of the organization. In applying this stamp tax we find no substantial reason for distinction between this textile manufacturing company and other textile manufacturing companies.

The judgment of the District Court is reversed, and the case will be remanded to that court with direction to enter judgment for the defendant, and the plaintiff in error recovers costs in both courts."

186—*Income Tax.*

The Federal Income Tax of 1913, under Section II, G (a) provided for taxes on incomes of corporations, joint-stock companies, or associations and insurance companies. Section II D provides for tax on the income of the individual and in addition reads as follows: "Trustees, executors, administrators, agents, receivers, conservators, and all persons, corporations or associations acting in any fiduciary capacity, shall make and render a return of the net income of the person for whom they act." It was decided in the case of the Wachusett Real Estate trust,[21] that a trust for business purposes is subject to Section II D of the Federal Income Tax Act, and that the law is complied with

[21] Crocker v. Malley, Supra. This case is reported in the main under Trust as an Entity.

when the trustees as fiduciaries make return of the amounts which the beneficiaries are entitled to and receive as profits or income of the trust. No tax is paid on the income of the trust as such; however, the beneficiaries pay income tax on the individual dividends or amounts they receive from the trust. In the case just cited an income tax was assessed against the trust as an association, the trust paid the tax under protest and then filed suit against the collector of internal revenue.

The District Court of the United States for the District of Massachusetts, sustained the theory of the trustees, that they should not be taxed as an association but as a fiduciary as provided in Section II D of the act. The collector of internal revenue appealed to the Circuit Court of Appeals and there the court held that the District Court was in error and that the trust was properly taxed on its income under Section II G (a) as an association. The trustees then appealed to the United States Supreme Court and there the court held that "It would be a wide departure from normal usage to call the beneficiaries a joint-stock association when they are admitted not to be partners in any sense, and when they have no joint action or interest and no control over the fund. On the other hand, the trustees by themselves cannot be a joint-stock association within the meaning of the act unless all trustees with discretionary powers are such, and the special provision for trustees in D is to be made meaningless. The recovery therefore will be from the United States; the plaintiffs—as they themselves alleged in their claim—were the persons taxed, whether they were called an association or trustees. They were taxed too much. Judgment of the Circuit Court of Appeals reversed; judgment of the District Court affirmed."

CHAPTER XVIII.

THIRD PARTIES—CREDITORS.

187—Taking or Dealing with Trust Property with Notice.

Trust funds and trust property are for the use and benefit of the shareholders exclusively, and one dealing with a trustee knowingly in violation of his trust, may be bound to the extent of the trustee's violation, for the rule is that one who receives with notice, money or property of a trustee in breach of the trust, becomes himself a trustee and is liable to account as such.[23] Where one has been dealing with a firm managed by three trustees whose names are printed on the letter-heads of the firm, any change in the letter-head is notice sufficient to put him on inquiry as to the change in the management of the business of the firm.[24] Once a person is put upon notice in dealing with trust property, it is his duty to ascertain the extent of the trustee's capacity to contract, for he cannot rely on the apparent scope of such authority.[25]

A trustee who uses the trust fund for purposes of speculation is violating the trust; and persons who take the trust securities from him in connection with such a transaction with full notice that they are impressed with the trust, are bound to account for them.[26] Where the facts are sufficient to put a person dealing with trustees on inquiry as to the limitations on the powers and authority of the trustees, he will be regarded as having con-

[23] Donnelly v. Alden, 229 Mass. 109, 118 N. E. 298.

[24] Noyes v. Turnvull, 130 N. Y. 639, 29 N. E. 145.

[25] Rand v. Farquahr, 226 Mass. 91, 115 N. E. 286.

[26] English v. McIntyre, 29 App. Div. 439, 51 N. Y. Sup. 697.

structive notice of the trust, and knowledge of the trustees violation of the trust conditions will be chargeable to him.[27]

188—*Creditors of Trust Company.*

The question as to whether parties dealing with trustees are creditors of the trustees personally or of the trust company, depends upon the authority of the trustees to bind the trust estate and whether the creditor accepts the trustees personally on the trust estate for the debt. Where the trust instrument expressly authorizes the trustee to invest the trust funds in merchandise—it being apparent that it is intended he should use them in his business—a party selling merchandise to the trustee may look to the estate for payment therefor.[28] Contractors may agree with trustees to erect a building and to look only to the trust fund for their compensation, and afterwards agree to do certain additional work; the question as to whether the additional work is a charge against the trustees personally or the trust estate is one of intention of the parties.[29] Where trustees are authorized to carry on a business and contract debts, with provisions that at the termination of the trust and before a transfer of the property, they shall be indemnified against any personal liability incurred in the proper execution of the trust, creditors may at the expiration of the trust period and before a transfer of the property, sue in equity to have the rights of the trustees for indemnity out of the trust fund enforced in their favor for the payment of their claims.[30]

[27] Ludington v. Mercantile Natl. Bank, 102 App. Div. 251, 92 N. Y. Sup. 454.

[28] Wadsworth, Howland & Co. v. Arnold, 24 R. I. 32, 51 Atl. 1041.

[29] Rand v. Farquahr, Supra.

[30] Mason v. Pomeroy, 151 Mass. 164, 24 N. E. 202. See also: Liability of Trustees, Limitation of Trustee's Liability, Liability of Beneficiaries, and Beneficiaries not liable as partners.

CHAPTER XIX.

BANKRUPTCY.

189—*In General.*

The bankruptcy act was intended not only to secure equality among creditors, but also to benefit the debtor in discharging him from his liabilities.[31] The releasing of the bankrupt from his debts is a most important consideration in determining whether trusts may be adjudged bankrupt. In a pure trust, properly drawn, the trustees hold title to all property, and their liability is limited by the trust agreement so there is no necessity for a discharge or a release as to them, because there is no liability; the beneficiaries or shareholders are also exempt from liability and to this extent they should come under the same rule as the trustees. So it would seem that in a pure trust there is no one to discharge from liability and for that reason the bankruptcy act should not apply to it. The act itself is silent as to adjudication of a trust so, for the present at least, we shall have to look to the courts and their decisions and from that source draw our conclusions as to whether this form of business organization is subject to adjudication in bankruptcy.

In its relation to the trust, the bankruptcy act was discussed in the case of the Co-Operative Society of America by Judge Evans of the District Court, Northern District of Illinois.[32] In this case an involuntary petition in bankruptcy was filed; a motion was made by the trustees to dismiss the petition on the

[31] 3 R. C. L. 164.

[32] In re Parker, et al. (No. 29464), 275 Fed. 868.

ground that they were not insolvent and that they were not subject to the bankruptcy laws. The court said in passing on the motion: "The bankruptcy act was a general enactment of a remedial character, and should be liberally construed to effect the purposes of the enactment.[33] The general object of the act, as I understand it, is to secure an equal distribution of the assets of an insolvent party among the unsecured creditors. The respondents (the Co-Operative Society of America) assert that they are the trustees of a "common-law trust" or a "pure trust" or a "Massachusetts trust," and are not subject to the bankruptcy act, though engaged in a commercial enterprise of wide scope and in various fields. One is impressed therefore, at the outset, that if such a commercial enterprise is not subject to the bankruptcy act, it was an oversight on the part of congress.

But, confessedly, the bankruptcy act must itself furnish the answer to this first query. In other words, if the bankruptcy act does not make business concerns, associations, or companies of the character of the respondents, subject to an adjudication in bankruptcy, this court must dismiss the petition. It likewise appears to me that if the bankruptcy act covers or includes companies like respondents, it must be by virtue of sections 4 and 5 of the act. These two sections define the parties who may be adjudged a voluntary bankrupt, as well as an involuntary bankrupt. Examining section 4b, we can readily understand who is defined by the term "natural person." Likewise we may readily know who is meant by a "partnership" as used in section 5. With equal certainty we may understand what is meant by the term "corporation" as used in section 4b, but uncertainty may well arise over the term "unincorporated company." Re-

[33] 5 Cyc. 242.

spondents ask the court to give this term a restricted meaning. But should the court do so, if the result of such a construction is to defeat in part, at least, the manifest purpose of the entire enactment?

The words "any unincorporated company" were not present in the act when it was originally introduced in congress. They were added in the committee. The term is comprehensive in its ordinary and usual meaning. When used with the other terms, "natural person," "corporation," and "copartnership" it completes the description of all subjects which may be adjudged bankrupts. It seems to me that its insertion in the act denotes a congressional intent to be inclusive in the characterization of organizations or of individuals subject to bankruptcy. If the words be given their normal meaning used as a part of the entire context, we can find nothing in the adjective "unincorporated" that does not include respondents. The adjective plus the noun "company" is, of course, more elastic, more uncertain; but, used in connection with the words "natural person" and "corporation," it is entitled to such a meaning as will cover that which is neither corporation, natural person, nor copartnership.

A reading of section 4a strengthens this conclusion. There congress uses an expression which, properly construed in the light of the exceptions, includes everything that transacted business. Section 4b is not less comprehensive, but the exceptions are more inclusive. These views find support in Collier on Bankruptcy.[84] I recognize a contrary expression of opinion which may be found in Sears' work on Trusts."

Considering all phases of this question, the court concludes

[84] 11th Ed. p. 154. In matter of Associated Trusts (D. C.) 222 Fed. 1012 and In re Order of Sparta (Vadakin v. Cass et al.), 242 Fed. 235, 155 C. C. A. 75.

that the answer to the first query must be in the affirmative, i. e. that the Co-Operative Society of America, a trust, may be declared a bankrupt and made amenable to the present bankruptcy law. (Note.) In reaching its decision the court said it could readily understand that the trust was not included in the act under the terms "natural person" "partnership," or "corporation" but was included under the term "unincorporated company." In sustaining this theory the court reads other cases[35] into the record which we shall examine briefly. In the Order of Sparta case the question of its being a trust was not involved, it was an unincorporated association, so for that reason this case may be dismissed from the present consideration. In the other case relied on by the court, In re Associated Trust, the court found the trust to be an unincorporated company. These decisions are predicated upon the theory that the trust with capital, shares and certificates—and carrying on a business —has no standing in law as a trust, but must be classed as an "unincorporated company," "association" or something other than what it really is. This theory cannot prevail for the courts time after time have recognized the trust—as such—for business purposes.

(Note) Since the above was written the United States Circuit Court of Appeals reversed the decision of Judge Evans, saying in part, (Judge Baker) If the alleged fact was the truth, if the only relationship between plaintiffs and defendants was that of beneficiaries and trustees of an express trust wherein the trustees had full title and control and the beneficiaries had no title and no control beyond appealing to a court to restrain waste and malfeasance, then the facts should have been pleaded so that a demurrer could test the question whether the bankrupcty statute infringes upon the otherwise exclusive jurisdiction of equity over trusts.

35 In re Associated Trust, 222 Fed. 1012; In re Order of Sparta, 242 Fed. 235, 155 C. C. A. 75.

In passing on the trust as an entity, the state of Texas says:[36] "The first question arising on the appeal is whether the agreement entered into between the parties to the suit, and under the terms on which they organized and were conducting the business in which they were engaged, created a partnership or an unincorporated company, or a trust as distinguished from a partnership or such company. We have examined the trust agreement in question and the authorities at our command bearing on the subject as carefully as we have been able to do, and conclude that said agreement created a 'trust' and not a company, association, or partnership."

It was argued by the distinguished lawyer, Joseph H. Choate, in the case of Rice v. Rockefeller,[37] that "this trust or consolidation of interests is not a corporation or an association, or a partnership. So far as it is anything legally tangible, it is an ordinary trust—the creation of a court of equity." This is the view adopted generally,[38] the one followed by the United States Supreme Court for it says a trust is not a joint-stock association or company, and "we perceive no ground for grouping the two —beneficiaries and trustees—together in order to turn them into an association by uniting their contrasted functions and powers; although they are in no proper sense associated. It seems to be an unnatural perversion of a well known institution of the law."[39] Clearly, a trust is a well-known institution of the law, and should not be termed—for bankruptcy or other purposes—an unincorporated company.

[36] Davis v. Hudgins, 225 S. W. 73.

[37] 134 N. Y. 174, 31 N. E. 900, 17 L. R. A. 237, 30 Am. St. Rep. 658.

[38] Wrightington — Unincorporated Associations Sears work on Trusts, 7 A. L. R. 613.

[39] Crocker v. Malley, 249 U. S. 223, 39 Sup. Ct. Rep. 270, 63 L. Ed. 573, 2 A. L. R. 1801.

190—*Receivership.*

The question now arises if a trust cannot be declared a bankrupt and is not subject to the bankruptcy law, what is the proper procedure in case of insolvency, dissipation of trust assets, and like conditions. Inasmuch as the trust is subject to a court of equity, a receiver may be appointed in all proper cases. The rights of the beneficiaries to have a receiver appointed for a trust is discussed in the case of Davis v. Hudkins.[40] There the plaintiffs' application for the appointment of a receiver came on to be heard, and the demurrers were overruled. Then the court, apart from the sworn pleadings, heard the oral testimony of several witnesses introduced by the respective parties, and was of opinion that the application should be granted and thereupon by order and decree entered, appointed R. Sneed Kimbrough receiver to take charge of, keep possession of, and hold subject to the further orders of the court, all of the assets and property owned or belonging to the Davis-Coggins Oil Company, a trust. From this order and judgment of the court, the defendant J. C. Davis for himself and the Davis-Coggins Oil Company appealed. In passing on the questions raised the court said:

"The first question arising on the appeal is whether the agreement entered into between the parties to the suit, and under the terms on which they organized and were conducting the business in which they were engaged, created a partnership or an unincorporated joint-stock company, or a trust as distinguished from a partnership or such company. We have no statute defining an unincorporated joint-stock company or association, and we gather from decisions and elementary works that some

[40] 225 S. W. 73. See paragraph 85—Receiver may be appointed in emergency ex-parte and without notice.

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190—*Receivership.*

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40 225 S. W. 73. See paragraph 85—Receiver may be appointed in emergency ex-parte and without notice.

of them combine the elements of both partnership and trust, while others are essentially trusts and not partnerships. This we think is undoubtedly true, but it is equally true that it is frequently a difficult problem to determine the line that divides them. We shall not undertake to point out this line of demarkation as shown by the authorities, but shall content ourselves, for the purposes of this opinion, with the statement that we have examined the trust agreement in question and the authorities at our command bearing upon the subject, as carefully as we have been able to do, and conclude that said agreement created a trust, and not a company, association, or partnership. The written articles of association here are very similar, in essential particulars, to those expressed in the instrument involved in the case of Bingham v. Graham,[41] and in that case it was held that the 'association' belonged to the class designated as 'trusts' by Mr. Wrightington in his work on Unincorporated Associations. If our conclusions that the trust agreement here in question created a trust as distinguished from a partnership is correct, then the contention of appellant to the effect that the suit ought to be abated for the want of necessary parties should not be sustained.

191—*Not Necessary for All Beneficiaries to Join in Suit for Receiver.*

The relation existing between the parties not being that of partners in the sense that the trust agreement created an ordinary partnership, it was not necessary that all of the stockholders of the association be made parties to the suit. While the rule is well established that all parties in interest ought to

41 (Tex.), 220 S. W. 105.

be made parties, there are exceptions to the rule. The case, as shown by the pleadings, is one in which the defendants, trustees, are sued by some of the beneficiaries, not only for themselves, but for all the minority stockholders of the association, alleging breach of trust, misapplication of trust funds and assets of the association for their own personal gain and profit, etc., and praying for the appointment of a receiver. Although proper parties, it was not essential to the right of the named plaintiffs to bring and maintain this suit that all stockholders of the association not named as plaintiffs, but in whose behalf the suit was brought, should appear as active parties to the suit. We understand it is well established that suits in equity may be brought by or against some of the members of an association or trust like the one under consideration as representatives of all the members. This seems to be especially true in such cases where, as here, the defendants were managing officers or trustees. Such cases simply declare the equitable doctrine of virtual representation and the doctrine has in many cases been applied to members of unincorporated associations. The rule has been applied in a suit to enjoin a strike of laborers, the court holding that it was sufficient to bring in the leaders of the strike to represent the organization, regardless of their official relation to the society.[48]

As an exception to the rule that all persons having an interest in the subject matter of an equity suit must be made parties, the doctrine of virtual representation, which originated at an early date, recognizes the right of a few persons to sue for themselves and all others similarly situated. Under this doctrine, the persons who are not joined by name as parties are

[48] American Steel Wire Drawers, Nos. 1, 3, (C. C.), 90 Fed. 598, 20 R. C. L. 669, sec. 9.

in a sense before the court. They have been called quasi parties and have been said to be parties even in substance and legal effect. In all cases to which the doctrine of representation applies there must be joined as parties, persons who fairly represent the interest or right involved so that it may be tried fairly and honestly. It is sufficient if the parties before the court enable it fairly and fully to adjudicate the question involved. The parties represented must have a common interest with those before the court and consequently the parties before the court cannot act as representatives if their interests are antagonistic to those who would be represented. The most frequent application of the doctrine of virtual representation is to members of a class. And while this doctrine has been applied to the members of a class who have a common or general interest, and it is difficult or inconvenient to make all of them parties, though they are not numerous, yet many decisions have established the rule that the doctrine applies only where the persons interested are numerous, so that it would be impracticable or inconvenient to make all of them parties. And so, a suit in equity may be brought by some of the members of an unincorporated association as representatives of all the members, whether organized for public or private purposes, and in some of the cases relating to members of such associations stress has been laid on the fact that the members were numerous. The doctrine of representation has also been recognized in cases of trusts, so that persons beneficially interested are considered as represented by one occupying a trust relation, especially when the cestuis que trusts are numerous, so that it would be impracticable to bring all of them before the court.[48]

In section 11 of the authority just quoted, it is said: "Apart

[48] Ruling Case Law, Vol. 20, Sec. 9.

from the question of the parties being numerous, the rule of representation has been applied to defendants representing as trustees all parties having a beneficial interest in the subject-matter." We think the plea of non-joinder of parties in this case was properly overruled.

192—*Evidence Must be Positive as to Wrong-doing of Trustee Before Court Will Appoint Receiver.*

The next question for consideration is whether or not the trial court was authorized under the evidence adduced, to appoint a receiver. Our conclusion is, this question should be answered in the negative. The hearing of the application for a receiver was not submitted and determined on the sworn pleadings of the parties. Apart therefrom, and as a basis for the court's action, oral testimony of witnesses was heard. Admitting for the purpose of this appeal that the appellees' petition showed a cause of action, and that the facts alleged were sufficient to justify the court in the exercise of a sound discretion to grant the prayer for a receiver, yet, in the opinion of this court, the testimony introduced and upon which the court evidently predicated its decision, was wholly insufficient to authorize the appointment of a receiver, and for that reason the judgment must be reversed.

In reaching this conclusion we are not unmindful of the prevailing rule that the appointment of a receiver rests largely in the discretion of the court and that the appellate courts will not ordinarily interfere therein unless an abuse of discretion appears. It is well said, however, that the remedy of a receivership is in all cases to be cautiously applied and that receivers should not be appointed except on a clear show-

ing that the applicant's rights imperatively demand it.[44]

The record discloses the formation of a trust and that by the declaration of a trust executed, the management of all the affairs of the association so formed was vested in a named board of trustees and their successors, the board having the power to elect a president, vice president, secretary and treasurer, and to create such other offices and appoint such other officers as the board might deem proper. The instrument further vests the title to all property acquired or to be acquired by the association in such trustees as joint tenants. Upon the trustees is conferred, among other things, full power and authority, upon a majority vote of the board, to conduct the business and to do and perform all things which in their judgment might be necessary in the management and conduct of the business. The trustees by the instrument referred to are given the power and authority, not only to manage the property of the association, but, to "invest, reinvest, and dispose of the same and to collect and receive and distribute the income and profits therefrom for the benefit of the holders of the certificates of shares from time to time issued and outstanding under said instrument in the manner and subject to the stipulations and limitations therein contained." It is stipulated that "the trustees shall have and exercise the exclusive management and control of all property at any time belonging to the trust," with all the rights and powers of absolute owners thereof, subject only to the purposes of the agreement entered into; and in the conduct of the business to execute contracts in the names of the trustees as may be necessary or convenient; to purchase, contract for, lease

[44] Galvin v. McConnell, 53 Tex. Civ. App. 486, 117 S. W. 211; People's Inv. Co. v. Crawford (Tex. Civ. App.), 45 S. W. 738.

or otherwise acquire such property as they may deem necessary or proper; and to sell and convey any part of the property of the trust.

A detailed statement in this opinion of the testimony is impracticable. A careful examination of it, however, has convinced us that it is too lacking in probative force to justify the conclusion that defendants have been guilty of such fraud, mismanagement of the property and affairs of the association in question, or dissipation of its assets as justified the appointment of a receiver. The testimony of the witnesses offered by appellees as to some of the charges of wrong-doing on the part of the defendants is of a negative character and insufficient to sustain any of them that would warrant the appointment of a receiver, while the testimony of the witnesses offered by the defendants shows conclusively that no ground for the appointment of a receiver existed at the time of the hearing of the application therefor. The charge and contention that the trustees failed to call the annual meetings, or meeting, for the election of trustees as provided for in the trust agreement, is based upon the testimony of appellees' witnesses, to the effect that they had no knowledge of any such calls, or meetings, whereas the testimony of the witnesses tendered by the defendants shows that such meetings, practically as directed by the terms of the trust agreement, were called.

The charge that the trustees in control of the business of the association refused to permit the stockholders to investigate its affairs or to have a voice in the selection of the officers of the association is not sustained by the testimony of the plaintiff's witnesses and is disproved by the testimony of the defendants' witnesses. Besides the trust agreement, as we understand it, shows that the trustees were authorized and

empowered to select the company's officers. We do not think there is any testimony to warrant the conclusion that the defendants or trustees surrendered to J. C. Davis alone control of the assets of the association. Nor do we think that the evidence warrants the conclusion that the books of the association were never opened by the trustees to the inspection of the stockholders and no account of the disposition of its funds kept. On the contrary, we think it very conclusively appears from the testimony in the record that books of the association were opened, and an account, whether entirely accurate or not, was kept. The purchase of the eleven acres of land described in plaintiffs' petition and the appropriation of $15,000 in payment therefor out of the money received from stockholders was not, we think, in excess of or in violation of the powers vested in them by the terms of the trust agreement. This land, it appears, was purchased for the association, and is held by the trustees like other property over which they were given full and absolute control, for the benefit of the association. Nor do we think the issuance of what is termed "promotion stock" is in violation of the trust agreement or the authority given thereby to the trustees, or operated to render the company insolvent.

Upon the whole we conclude that the facts presented fail to disclose any such invasions of the rights of the plaintiffs, or danger that the property of the association in question will not be preserved, as authorizes the appointment of a receiver. This court has heretofore said that the appointment of receivers "is regarded as one of the most difficult and embarrassing duties which a court of equity is called upon to perform," and is not to be exercised doubtingly, but that the court must be convinced that the relief is needful and that it

is the appropriate means of securing an appropriate end.[441] The petition for the appointment of a receiver was verified by the affidavit of the plaintiff J. C. Wright, and should it be conceded that, had the application for the appointment of a receiver been submitted on the petition and answer and receiver appointed, we would not be warranted in disturbing the court's action, yet it is clear that the oral testimony of Mr. Wright given upon the hearing, as sent to this court, does not support the allegations of the petition sufficiently to justify the appointment made.

[441] Harris v. Hicks, 13 Tex. Civ. App. 134, 34 S. W. 983.

CHAPTER XX.

BUSINESS AND LEGISLATION.

193—*In General.*

The business world is well aware of the cost and annoyance it has expended in the past due to the numerous changes and amendments to the corporation law with which it had to comply. Naturally it turns to the trust with the query, is it possible for the legislature to enact such laws that would force all business to organize as corporations? Thus far the legislature has applied its will only to banking and insurance. Some of this legislation has been sustained on the theory of regulation; some has been declared unconstitutional on the ground of class legislation and that it was an infringement on individual rights. Inasmuch as the trust is organized as a matter of right, it may be laid down as a general principle that any business the individual may engage in may also be deeded in trust, and, as such, be operated.

However, the question is still an open one as regards the validity of legislative enactment compelling banks and insurance companies to incorporate; both sides of this question will be presented hereinafter in well-argued cases. In Weed v. Bergh,[45] the court sustained the Wisconsin banking act in that banking is not legal within that state only as it is incorporated. In the case of Commonwealth v. Vrooman,[46]

[45] 141 Wis. 569, 124 N. W. 664, 25 L. R. A. (N. S.) 1217.

[46] 164 Pa. St. 306, 30 Atl. 217, 25 L. R. A. 250, 44 Am. St. Rep. 603.

the majority opinion of the court upheld the insurance law of Pennsylvania in that those who wanted to engage in that line of business would, of necessity, have to incorporate. Yet, Judge Dean writes a masterly dissenting opinion on the question of regulation and prohibition, in which Judge Green and Chief Justice Sterret concur. In the case of State v. Scougal,[47] the court asks, can the legislature create a franchise by depriving citizens of their rights and then bestow it upon another at will? If it can, then the citizen has no rights that may not be taken from him under this new theory of a franchise created by the legislature. In this case the court upholds the rights of individuals and declares the banking act unconstitutional which in the main provides that no banking may be done in South Dakota only as it is incorporated. These cases will be taken up in the order as above mentioned.

194—*Banking Limited to Corporations.*

In the case of Weed v. Bergh, supra, the courts upheld the constitionality of the Wisconsin banking act limiting this business to corporation only. In that case an action in equity was brought by a private banking partnership against the banking commissioner and the district attorney of Waupaca county to restrain those officials from enforcing chapter 285, Laws 1909, requiring all private banking concerns to incorporate, on the ground that the law is unconstitutional. The plaintiffs appealed from an order sustaining a general demurrer to the complaint by which it was alleged that the plaintiffs were copartners and had been such for many years; they were engaged in the lumber, farming and milling business at Weyauwega, Wisconsin; since 1870 they had also been

[47] 3 S. D. 55, 51 N. W. 858, 15 L. R. A. 477, 44 Am. St. Rep. 756.

doing a banking business at Weyauwega consisting of receiving deposits, discounting and negotiating notes, buying and selling exchange, etc., that in 1873 they organized a corporation with capital stock of $30,000 called the Weed and Gumaer Manufacturing Company to carry on their general business, which corporation kept separate books of account and had assets consisting of unencumbered real estate, mills, and other property in and about Weyauwega worth $160,000; that the copartnership had on deposit with it as private banker upwards of $250,000 and loaned out over $200,000 on first-class securities, many of which would not come due till after September 1, 1909; that they passed successfully through the panics of 1893 and 1907 and had the confidence and respect of the community; that the defendant Bergh as state banking commissioner and the defendant Severson as district attorney, threatened that unless the plaintiffs incorporated or got out of the banking business, they would cause criminal warrants to be issued and prosecute the plaintiffs under chapter 285, Laws 1909; that in order to comply with that law, it would be necessary for plaintiffs to incorporate in a sum in excess of $150,000 or to convert immediately their real estate and chattel holdings into personal property, and that to attempt such a thing would result in forced sales at inadequate prices, confiscation of their property, destruction of their business, and irreparable damage; that the law violated the following provisions of the constitution of Wisconsin, viz: article 1, Section 1: "All men are born equally free and independent and have certain inherent rights, among these are life, liberty and the pursuit of happiness;" article 1, Section 8: "No person shall be held to answer for a criminal offense without due process of law;" article 1, Section 13: "The property of no person shall be taken for public use without just com-

pensation therefor;" article 1, Section 22: "The blessings of a free government can only be maintained by a firm adherence to justice, moderation, temperance, frugality, and virtue, and by frequent recurrence to fundamental principles;" that the law also violated the fourteenth Amendment to the Constitution of the United States, which inhibits any state from depriving any person of life, liberty, or property without due process of law, and from denying to any person the equal protection of the laws.

Chapter 285 of the laws of 1909 adds three sections to the general banking laws of Wisconsin, numbered respectively, 2024-78l, 2024-78m, 2024-78n. The first of these sections provides that "the soliciting, receiving, or accepting of money, or its equivalent, on deposit as a regular business by any person, copartnership, association, or corporation shall be deemed to be doing a banking business, whether such deposit is made subject to a check or is evidenced by a certificate of deposit, a pass book, a note, a receipt, or other writing, provided that nothing herein shall apply to or include money left with an agent pending investment in real estate or securities for or on account of his principal." The second of the sections named makes it unlawful for any person, copartnership, association, or corporation to do a banking business without being incorporated as either a national, state, mutual savings, or trust company bank, and makes a violation of the provision a misdemeanor punishable by fine or imprisonment or both. The third of the sections provides that any person, copartnership, association, or corporation doing business in the state as defined in the act may incorporate as a state bank on or before September 1, 1909, as provided in Section 2024-55 of the statutes. The act was approved June 3, 1909, and published on the following day.

though we are inclined to think that this would be very difficult of accomplishment without overstepping some of the constitutional guaranties of rights to the citizen. If, as a matter of fact, the requirement of incorporation is a form of regulation reasonably calculated to meet and remedy these difficulties, though not in the wisest way, it must be sustained as an exercise of the police power. We have been referred to but one case which holds the contrary doctrine, namely: State v. Scougal, supra, which indeed holds that an act requiring incorporation as a condition of doing banking is unconstitutional. The discussion of the question there is long and learned, but not convincing to us. It is to be noted, further, that the constitution of South Dakota contains an unusual provision which figures largely in the result. This provision is to the effect that no law shall grant to any citizen, class of citizens, or corporations, privileges or immunities which on the same terms shall not equally belong to all citizens or corporations; the weight of decision as well as text-book authority is the other way."[48]

195—*Regulation is not Prohibition.*

"The objection that the law absolutely prohibits an individual banker from doing business and hence cannot be considered as valid regulation, is plausible, but not convincing. Many police regulations have the effect of prohibiting a business unless certain conditions are first complied with. The legislature says: 'If you wish to engage in this quasi public

[48] 1 Morse, Banks & Banking, Sec. 13, 5 Cyc. Law & Proc. 433; Boone, Banks and Banking, Sec. 10; State ex rel. Goodsill v. Woodmansee, 1 N. D. 246, 11 L. R. A. 420, 46 N. W. 971; Myers v. Manhattan Bank, 20 Ohio 283.

business of banking, you must first secure a corporate charter.' It does not say: 'You can not go into it, but you must go into it in a certain way which is deemed the safest for the public.' The obtaining of a bank charter is made by the act practically a matter of course. Three adult residents of the state may at any time associate together, execute the required articles and file them, and the corporation is formed. The danger that any citizen who wishes to go into the banking business will be unable to find two other adult residents who will be willing to join in executing the written articles of incorporation is so small as to be negligible. People can do banking as before, except that they must do it by means of a corporate organization. This is regulation, not prohibition.[49]

The scope of the act under consideration, and the question as to the kinds of business which it covers, are considered in the case of Maclaren v. State.[50] As the act, under any possible construction, unquestionably applies to the business transacted by the appellants, it becomes unnecessary to consider in this opinion what other business operations it may cover.

The act gives but three months in which to convert a private bank into a corporate bank, and the complaint alleges that the plaintiffs will be obliged either to incorporate in a sum exceeding $150,000 as a capitalization, or immediately convert their real estate and chattels into money at forced sales—which would entail great loss and practical confiscation. The complaint alleges that the deposits of the bank aggregate $250,000 and the loans and discounts on first-class securities including loans to the Weed & Gumaer Manufacturing Company, a corporation, exceed $200,000. The amount of cash and

[49] Commonwealth v. Vrooman, 248, 44 N. Y. Sup. 42. Supra; People v. Loew, 19 Misc.

[50] 141 Wis. 577, 124 N. W. 667.

other assets is not stated. In villages having less than 1,500 inhabitants (of which class Weyauwega is one), the capital stock of a bank is not required to be more than $10,000, (Sanborn's Stat. Sup. 1906, Sec. 2024-6) The allegation that in order to incorporate under the law, the plaintiffs will be obliged to capitalize at $150,000, or dispose of their real property apparently has no foundation, unless it means that as private bankers they have loaned to their corporation so large a sum that under the provisions of Sec. 2024-32 they must have a capitalization of that amount in order that the loans to a single corporation will not exceed that fraction of the capital stock which that section prescribes, viz: thirty per cent of capital and surplus or fifty per cent in case such percentage is approved by a two-thirds vote of the directors.

If this be the case, still we fail to see how the sacrifice of the plaintiffs' property is necessitated. According to the complaint, the corporation has $160,000 worth of unincumbered real and personal property. It goes without saying that loans on this property can be readily obtained at reasonable rates of interest on long or short time as the plaintiffs may desire, which would enable them to reduce their bank loans to any figure which may seem best. All the time necessary to convert their property into money at the most favorable prices may thus be obtained.

A minor objection is made to the act in this: that it is alleged that the proviso appearing at the end of the first section of the act as printed appeared in the first line of the section after the words 'to read' when the act went to the governor for his approval. Referring to the Senate Journal for 1909 pp. 793, 863, it appears that the bill as introduced in the senate lacked the proviso, but that it was amended in the senate by adding at the end of Sec. 1 the proviso, and

as so amended was concurred in by the assembly. Section 1 of the bill does not end with the words 'to read' but rather with the word 'statutes' at the end of Sec. 2024-78n, a position where it would be exactly as appropriate and forceful as at the end of Sec. 2024-781. It further appears (Senate Journal p. 874) that a resolution was passed in the senate directing the committee on enrolled bills to correct the error and place the amendment at the end of Sec. 2024-781. This resolution however, does not appear to have passed the assembly. In any event, it seems immaterial. The bill passed with the proviso in a place where it would be just as effective as in the place where it appears in the printed statutes, and the change of position, even if unauthorized, cannot be considered as vitiating the legislation; order affirmed."

196—Insurance Limited to Corporations.

The majority of the court in the case of Commonwealth v. Vrooman uphold the constitutionality of the insurance act of Pennsylvania which limits the business of insurance to corporations. In this case an appeal was taken by the State from a judgment of the Court of Quarter Sessions for Philadelphia County in favor of defendant upon an indictment charging him with unlawfully issuing a policy of fire insurance. The defendant acting for himself and as attorney-in-fact for J. K. Cuming, R. H. Foerderer, B. J. Woodward, C. A. Furbush and J. Gibson McIlvain, signed and issued on the 12th day of March, 1894, a certain policy of insurance and contract of guaranty against loss by fire in the sum of $1000 on the household furniture of James G. Kimball, located in the county of Philadelphia, Pennsylvania, without authority expressly conferred by a charter of incorporation given according to law April 12, 1894.

"This case raises a question of constitutional law that does not seem to have been decided by the courts of this state. The facts are that in 1870 the legislature passed and the governor approved an act entitled 'An act to prevent the issue of unauthorized policies of insurance.' Section 1 made it unlawful for any person, partnership, or association to issue any policy of insurance against fire without authority to do so expressly conferred by a charter of incorporation given according to law; and declared all policies issued without such authority void. Section 2 made it a misdemeanor to issue a policy of insurance against loss by fire without the authority required by the first section. The special verdict rendered in this case found that the defendant did violate the act of 1870 by making and issuing for himself and others a policy against loss by fire in the year 1894 without having obtained a charter of incorporation authorizing the making of such insurance.

Upon this verdict the learned judge of the court below entered a judgment in favor of the defendant, holding that the Act of 1870 was void because in violation of the Constitution of the United States and of this State; the commonwealth appealed. A single question is thus presented, viz: does the Act of 1870 violate the Constitution of either the United States or this state? The learned judge held that the Fourteenth Amendment to the Constitution of the United States was infringed by the Act of 1870. This amendment declares that "no state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor deny to any within its jurisdiction the equal protection of the laws." The purpose and effect of this amendment have been discussed and declared by the United States courts in many cases, and there ought to be no doubt

upon the subject at this time. It was aimed at discriminations made or attempted by the laws of any of the states against persons upon whom the laws of the United States conferred the rights and privileges of citizenship. Such discriminations whether directed against persons of a particular race or color resident within the state, or against persons resident in other states, are forbidden by the Fourteenth Amendment.

But the proper exercise of the police power by the several states is not within the intent or the letter of the amendment.[51] On the other hand its purpose as declared in the slaughter-house cases[52] to be to protect "against the hostile legislation of the states, the privileges and immunities of citizens of the United States as distinguished from the privileges and immunities of citizens of the states." The Act of 1870 strikes at no privilege of citizenship of the United States as distinguished from the privileges of citizenship of Pennsylvania. It does not attempt to draw a line between citizens of this state and citizens of other states, it is, therefore, in no sense a violation of the Fourteenth Amendment of the Constitution of the United States, and this branch of the discussion may be properly dropped at this point and our attention confined to the other, viz:

197—*Police Power in General.*

Is the Act of 1870 a violation of the first section of the bill of rights in the constitution of this state? That section affirms that all "men are born equally free and independent

[51] Powell v. Pennsylvania, 127 U. S. 678, 32 L. Ed. 253, 8 Sup. Ct. Rep. 992.

[52] 83 U. S. 16, Wall. 36, 21 L. Ed. 394.

and have certain inherent and unalienable rights, among which are those of acquiring, possessing and protecting property and reputation." The methods by which this right to acquire property is asserted and exercised are, and have been since organized government began among men, subject to regulation by law. The power of government thus brought into service is known as the police power. If the Act of 1870 is a valid exercise of the police power, then no constitutional right is invaded, but the mode in which the right guaranteed by the first section of the bill of rights may be exercised consistently with the best good of the greatest number is regulated and prescribed. The general character of the police power is well understood although neither the text-books nor decided cases have yet given us an adequate definition of it. Little more has been attempted by the courts of this country than to determine that a particular subject does or does not fall within the range of this power. An illustration is afforded by Boston Beer Co. v. Massachusetts,[58] in which this language was used: "However difficult it may be to render a satisfactory definition of it (the police power) there seems to be no doubt that it does extend to the protection of the lives, health, and property of the citizens, and to the preservation of good order and the public morals."

Blackstone in his Commentaries, vol. 4, p. 162, describes this power as the power of "public police and economy" by which the internal regulation and good order of the state is secured, and individual citizens, like the members of a well-ordered family, are made to conform their conduct to the rules of propriety, good neighborhood and good manners. It is therefore a power inherent in all forms of government. Its

[58] 97 U. S. 25, 24 L. Ed. 989.

exercise may be limited by the frame or constitution of a particular government, but its natural limitations, in the absence of a written constitution, are found in the situation and necessities of the state, and these must be judged of in the first instance by the government itself. It corresponds to the right of self-preservation in the individual. When the dangers that threatened the state come from without; the right of self-preservation is exercised in gathering armies and the means of public defence. When the dangers arise within the state, self-preservation requires their suppression. This is accomplished by the exercise of the police power which deals with all forms of disorder, and provides for the public welfare and the protection of citizens against the violence and the fraudulent conduct of each other.

Now the question whether any particular subject is so related to the public good as to justify the exercise of this power in its control, is one for the determination, in the first instance, of the lawmaking branch of the government. In disposing of it the legislature is subject to no limitations except such as the constitution of the state may impose. Within the lines set by constitutional provisions the power of the legislature is practically absolute; but if it is alleged that a given police regulation violates the fundamental law, a question is raised for the determination of the courts whose duty it is to apply the constitutional tests and adjudge the law to be void if it is in conflict with them. In this case we are to apply the first section of the bill of rights to the Act of 1870 in order to determine whether it can be enforced. If the act denies the inherent and inalienable right of the citizen to acquire, possess, and protect property—which is asserted by this section of the bill of rights—then the judgment of the court below was right and this appeal should be dismissed;

but if this right is not denied, and the effect of the Act of 1870 is merely to regulate its exercise, then the judgment should be reversed and the defendant should suffer the penalty of the law he has disregarded.

Before entering upon this question, three preliminary observations should be made: first, we must remember that the legal presumption is in favor of the constitutionality of the act because it expresses the judgment of the legislative branch of the government upon that question. The legislature has considered the question and passed upon it and this makes a prima facie case in favor of the law. We observe in the next place that this question is to be considered upon the state of the law as it is when the question is raised. Since 1870 the constitution of the state has been remodeled and many of its new provisions have been enforced by suitable legislation. Our question is not, therefore, whether the Act of 1870 was valid under the constitution as it then stood, but whether it was valid when its provisions were invoked against the defendant in 1894. Our third observation is that the question is not controlled by common-law maxims. The police power must necessarily enlarge its range as business expands and society develops. The proper office of statutes is to remedy the defects and modify the operation of common-law rules to meet changed conditions in society and increased volume and improved methods in business.

198—*Insurance in Relation to Police Power.*

We come now to inquire whether the business of insurance against loss by fire is at the present time a proper subject for the exercise of the police power of the state. In examining this question it is important to know something about the

magnitude of the business. The report of the insurance commisssioner appointed under the laws of the state, covering the transactions of the year 1892 shows that risks were written in Pennsylvania during that year as follows:

By stock companies of Pennsylvania	$286,584,023
" " other states	412,489,251
U. S. Branches Foreign Companies	248,407,450
Mutual companies of Pennsylvania	137,328,820
	$1,084,809,544

making the enormous total of one billion and nearly eighty-five millions of dollars. The losses paid in the same year as shown by the same report amounted to nearly seven and one-quarter millions of dollars. The total capital employed in the business of fire insurance in this state during the year was nearly two hundred sixteen and one-half millions of dollars. The premiums paid by the insured fell a little short of twelve millions of dollars.

Let us consider next the nature of the business. It is not like the sale of commodities for a present equivalent in value, but it is the purchase of indemnity against the risk of loss by fire that may happen at any time, and may not happen at all. The conditions necessary to the business of insurance are: (a) the existence of a known danger to which all property owners are exposed and against which they cannot effectually protect themselves; (b) the strong probability that loss from this danger will fall upon but few of those who are exposed to it; (c) the certainty that when the loss happens it will fall so heavily on those to whom it comes as to make pecuniary indemnity a matter of great importance; (d) some knowledge of the relative value of the property annually destroyed by fire to serve as a basis for calculating the risk

assumed by the insurer, and the amount of premium required to enable the insurer to meet losses and expenses and secure a fair return for the capital employed.

In view of the magnitude and the nature of the insurance business it is apparent that the public is largely interested in all that relates to it. The security of policy holders requires: first, permanency in the custodian of the funds gathered from them and on which their indemnity in case of loss depends; second, an honest and competent administration of these funds; third; restraint against the division of the profits of the business whenever such division would injuriously affect the security of policy holders. How are these safeguards to be obtained? There is but one way in which they can be obtained and that is by means of general laws regulating the insurance business. Corporations derive their existence from the state and hold their franchises subject to legislative control. They are subject to the visitorial power of commonwealth, and they may be, and are in fact, required to lay open before the several departments of state government, and before the public, the character and extent of their business, the profits realized, the dividends declared, and the investments made. The legality and business value of the methods, the economy, and financial strength of the management, and the value of the security provided for the holders of policies in any given company are therefore subjects upon which the proper state officers may be thoroughly informed, and which the public may investigate at will. Private individuals are not subject to the same visitorial power. They can not ordinarily be compelled to disclose their business methods, their financial condition, or the character of their investments. They cannot be restricted in the use of either their capital or their profits as corporations may be. Those who deal with

them must trust more to their personal integrity than the common experience shows to be safe. The state can compel a fair measure of fidelity in the management of these vast sums, and provide for the safety of the insured when, and only when, the business is in the hands of corporations.

199—*Modern Legislation on Insurance.*

In the next place it is important to consider what may be described as the trend of modern legislation on this subject. The states of the Union have severally entered upon legislation regulating insurance. In each an insurance department of the state government has been organized. A general supervision and control of insurance companies has been assumed by the states and exercised through the insurance department. In our state this system of legislation began as early as 1810 and it has grown in bulk and importance with the growth of business and the development of the resources of the state. It fixes the minimum of actual capital necessary to the organization of a corporation for insurance against fire, on the stock plan, at one hundred thousand dollars. It prohibits the division of profits in dividends to the injury of the reserve fund. It regulates the form of policy and requires the application to be attached to, or made part of, the policy. It requires each company to submit detailed statements of the business done, of its assets and liabilities, and to show its financial condition. It requires companies organized under the laws of other states or countries to make certain deposits in this state to secure those who are insured by them and to appoint some suitable agent on whom process may be served in actions brought against them.

These regulations have been made from time to time as

their importance has been felt by the public. They are all easy of enforcement against corporations. Some of them cannot be enforced against private persons or partnerships. As a matter of fact, the business has for many years been left to the corporations and regulations made to affect corporations have therefore met fully the public need. At this time, however, private capital is seeking employment in this field and it signalizes its entry upon the field by a denial of the power of the state over it. The question has been raised by the corporations of other states, but I recall no case in which it has been raised by individuals. In Doyle v. Continental Ins. Co. of New York,[54] the Supreme Court of the United States stated the general rule thus: "A state has the right to impose conditions not in conflict with the Constitution of the United States on the doing of insurance business within its territory by an insurance company chartered by another state, or to exclude it altogether."

200—Regulation of Business under Police Power.

It would seem to follow logically that the state might require all persons desiring to enter upon the insurance business to comply with the same conditions, and if necessary, to obtain a charter of incorporation in order to meet such compliance. An effort is made to distinguish between regulation and prohibition and to hold that the Act of 1870 is a prohibition operating upon all natural persons for the benefit of corporations who are thus given an oppressive monopoly of the business of insurance against fire. But the prohibition is only such as is necessary to give effect to the regulation which the act prescribes. The act implies a declaration by the legislature that the business of in-

[54] 94 U. S. 535, 24 L. Ed. 148.

surance against fire affects so many persons and involves such large sums of money, as to make it necessary for the public protection that it be subjected to the supervision and control of the government; that the supervision required is such that private persons can not be compelled to submit their business conduct to; and then expressly declares that all persons desiring to embark in the business must procure a charter of incorporation for that purpose because corporations are subject to the supervision and control of the state that creates them. This is regulative. It directs the business into the only channel that admits the necessary measure of control and it necessarily prohibits the business outside that channel.

The traffic in intoxicating drinks is regulated by law; but the regulation prohibits absolutely all persons from engaging in it unless they have first secured the permission of the state by obtaining a license under the law. Here, as in the Act of 1870, we find permission to those who comply with the regulation, and prohibition to those who do not. The practice of medicine, the sale of drugs, and many other sorts of business are regulated by law; but the regulation would be without effect if it did not include a prohibition directed against those not qualified, and enforce it with suitable penalties. The police power of a state may be exerted for the complete or the partial control of a given business. It may prohibit it absolutely to all persons for the purpose of suppression. It may permit it to some persons under certain restrictions in order to secure control over it and hold it within proper bounds.[55] The Sunday laws, the laws against gambling, against lotteries, against disorderly houses, the sale of liquors, the sale of oleomargarine, the sale of drugs and many similar laws afford instances of the exercise of the

[55] Stone v. Mississippi, 101 U. S. 814, 25 L. Ed. 1079.

police power for the complete suppression of a given line of employment, or for its restriction and control.

The Act of 1870 belongs to the latter class. It does not prohibit the business of insurance, but regulates it. It says to all persons interested: "If you wish to embark in this business you must secure a charter of incorporation so as to subject your business to the visitorial power of the state. If you will not do this you must not engage in insurance against fire at all." This is not prohibition of the business, for the business is distinctly authorized. It is an effort to bring it under state supervision and control by requiring all who wish to enter the business to put themselves in a position where the insurance legislation of the state will reach them and the insurance department of the state can supervise their business and compel observance of the law. Without going further into the discussion we may now state our conclusions applicable to the case before us:

(1) The business of insurance against loss by fire is, by reason of its magnitude, its importance to property owners, and the nature of the business, a proper subject for the exercise of the police power of the state.

(2) The Act of 1870 is a valid exercise of the police power, it does not prohibit but regulates the business. It excludes no one from engaging in it, but prescribes the preliminary qualification necessary for all alike, to entitle them to enter the business.

(3) The qualification is reasonable; it is open to all under general laws; it is not burdensome; its only effect is to secure adequate capital at the beginning and state supervision during the continuance of the business.

(4) Upon the special verdict, judgment should have been entered in favor of the commonwealth and sentence should have

been pronounced under the Act of 1870. That this may now be done, the judgment is reversed, the record remitted and a procedendo awarded."

201—*Corporations with Exclusive Privileges are Monopolies.*

In the two preceding cases the doctrine is laid down that the legislature may prohibit individuals as such from engaging in the business of banking and insurance. The theory advanced and the one relied on in both cases is that the state may regulate business of this character. The power of the state to regulate is undisputed; but when the state grants to corporations the exclusive privilege to carry on certain business under the guise of regulation, an entirely different question is presented. It has been said that legislation of this character is unconstitutional for the reason it creates a monopoly in a certain class—regulation should not be, but is in fact, prohibition. This tenet is given in a dissenting opinion in the cases of Commonwealth v. Vrooman, supra, and State v. Scougal.[56] In substance, the dissenting opinion in the former case is as follows:

The Act of the 4th of February, 1870, declares it to be a misdemeanor for any person to issue a policy of insurance against loss by fire or lightning, without authority being expressly conferred so to do by a charter of incorporation issued according to law.

On the 12th of March, 1894, the defendant issued a policy to James G. Kimball in the sum of $1,000 indemnifying him against loss by fire on his household furniture contained in his dwelling house in Philadelphia, without authority expressly conferred by an act of incorporation. For so doing, he was

[56] 3 S. D. 55, 51 N. W. 858, 15 L. R. A. 477, 44 Am. St. Rep. 756.

indicted and tried March 20, 1894. There was no dispute as to the facts, and the jury in a special verdict found them as stated. The court, being of opinion the act was unconstitutional, entered judgment on the verdict for defendant and thereupon the commonwealth appealed.

Unquestionably, the legislature has the authority to enact any law not in conflict with the constitution of the state or of the United States. The right to limit the transaction of the business of fire insurance to incorporated associations is not in express terms, forbidden. But the right of natural persons to make contracts of indemnity against loss by fire or shipwreck was, for centuries before the adoption of the Constitution, a common-law right. All the authorities, without a single exception, hold that under the constitutional right to acquire, possess, and protect property, there is necessarily included the right to make reasonable contracts concerning it, which contracts are protected by the Constitution. In this, all agree. And all agree, further, that the legislature may, in the exercise of its police power, absolutely forbid contracts which are inimical to public interests; and may adopt suitable regulations of contracts for the protection of the public.

The business of fire insurance being one which, from its nature, involves contracts with large numbers of persons in all parts of the commonwealth who have not the opportunities of gaining the information necessary to intelligent bargaining for their better security, the legislature may make such regulations as will protect them against fraud or imposition. It may require that all who desire to transact business with the public shall take out a license, shall make frequent reports of their financial condition, have fixed places of business where service of process can be had on them; that they shall deposit with the treasurer or other officer of the commonwealth, bonds or

other securities in sufficient amount to guarantee those with whom they contract against loss; and generally, may make all reasonable rules for the regulation of such business. But can the legislature absolutely forbid the making of such a contract by individuals, and confer on corporations a monopoly of such business?

Is the business of fire insurance deleterious to the public? If so, the legislature may absolutely prohibit it. But no one contends that it is. On the contrary, it is admitted it is to the advantage of the public. The legislature admits this by expressly authorizing artificial persons to conduct it. If such contracts be not injurious to the public, and may not be altogether prohibited, then where is the authority to prohibit one class—natural persons—from entering into them, and specifically empowering another and numerically a very much smaller class—artificial persons—to make them? In so doing the state grants a monopoly in a particular business to a particular class.

As is said in substance in the slaughter-house cases[57] and many other cases, "all such grants relating to any known trade have been held by all the judges of England to be void at common law as destroying the freedom of trade, discouraging labor and industry, restraining persons from getting an honest livelihood, and putting it in the power of the grantees to enhance the price of commodities."

A contract of indemnity against loss by fire, being a common-law right, cannot by legislative grant be monopolized by a small class, unless it has become of such public concern as requires its exercise by the state or by a corporation to whom the state's

[57] 83 U. S. 16 Wall. 102, 21 L. Ed. 417; Alger v. Thacher, 19 Pick. 54, 31 Am. Dec. 119; Taylor v. Blatchford, 13 Allen 372, 90 Am. Dec. 203.

power is immediately delegated. It may be admitted that the business of constructing and operating public highways for the carriage of goods and travelers is exclusively in the state and is of such immediate public interest that it can be transacted only by the state and such corporations as the state may specially authorize. But, to carry on this business at all, involves a right of eminent domain which the state alone can exercise or grant and therefore it ought not to be exercised by private individuals. There is not, and never was, a right in the individual to take private property for the construction and operation of a public highway on which to conduct for profit the business of transportation; but there was never a time that the individual had not the right to make a contract to indemnify his fellow against loss by fire. This act is not obnoxious to the constitution because it authorizes corporations to insure against fire, but because it prohibits individuals doing a like business. It grants a monopoly of a particular business to a particular class; prohibits all others from engaging in it. This the legislature may in the exercise of its police power in some cases do, it may declare that females shall not be employed in some avocations; that children under a certain age shall not be employed in mines or factories; that none but men of good repute shall sell liquor by retail; and the wisdom of such legislation is not a question which the courts can consider, for it is adopted to promote the health, morals, and good order of the public.

202—Issuing Banknotes not a Private Right.

That in some of the states the legislature has restricted the business of banking to corporations, has no analogy to the case in hand. The banking intended to be restricted by the New York act was issuing of notes, receiving of deposits and dis-

counting. In People v. Utica Ins. Co.,[58] it was held that the act was only a restraining and regulating act applying to associations of individuals; that as to them, to do a banking business, they must have corporate authority; that an individual was not prohibited from doing a banking business except as to issuing bank notes. It has always been held to be within the police power of the legislature to restrict the issuing of notes intended to pass as money, to corporations. It is a matter which concerns the entire public who have no opportunity in the hurry of every-day business transactions of life to ascertain the value of the promise which is tendered as money. But in a contract of indemnity, why should not the citizen make his contract when and where the price and security suits him best? Why should the legislature take from the whole people their common-law right of contract for insurance and grant it to a particular class? Where is there the semblance of the constitutional exercise of the police power in this?

Under the Corporation Act of 1874 and supplements, corporations for almost every business are authorized, such as supplying ice, printing and publishing, conducting hotels, droveyards livery-stables, lumbering, quarrying, mining, brewing, distilling, improvement and sale of real estate. In fact, almost every kind of business can be transacted by incorporated companies. All concern the public. If this act be constitutional, the legislature can prohibit the transaction of any business if not conducted by corporations under the Act of 1874, and under the pain of imprisonment, forbid the individual engaging in any business whatever.

203—*Exclusive Grant to a Class is Prohibition, not Regulation.* It is paternalism to assume that citizens are incapable of pru-

[58] 15 Johns. 358, 8 Am. Dec. 243; Briston v. Barker, 14 Johns. 205.

dently contracting with reference to their property without an express grant of the state in the shape of corporate franchise to one of the contracting parties. It is an assumption that the citizen is a child, needing the tutelage and protection of the legislature in the ordinary affairs of business life or else it is a species of tyranny in government like that of Turkey where the rights to produce, manufacture and trade are all the subject of grant from the sultan. If the exercise of the right to contract to indemnify be injurious to the public then it ought to be prohibited; if beneficial, it ought not to be monopolized by a few.

The rule to be educed from Budd v. New York,[59] and all the cases where the police power of the state is discussed, is that while a business affected by a public interest may be regulated, yet when not inimical to the health, morals, or safety of the people, it can not be prohibited. I do not think an exclusive grant to a class is regulation; that is prohibition of all others and is therefore unconstitutional. The judgment in my opinion should be affirmed and the appeal dismissed. Sterret, Ch. J., and Green, J., concur in this dissent.

204—*Banking Act of South Dakota.*

In the case of Weed v. Bergh, supra, the Supreme Court of Wisconsin upheld the banking act of that state in its provision which excluded the individual as such from engaging in that business; in opposition to this opinion the Supreme Court of South Dakota declared its banking act unconstitutional as it sought to exclude the individual as such from engaging in the banking business in that state. This principle is set forth in

[59] 143 U. S. 523, 36 L. Ed. 250. S. 700, 25 L. Ed. 496. The Sinking-Fund Cases, 99 U.

the case of State of South Dakota v. Scougal[60] and is as follows:

This case comes before us on a writ of error issued on behalf of the state to the County Court of Yankton County to review the judgment of that court sustaining a demurrer to the information filed against the defendant in error, and quashing the same. The legislature of this state at its last session passed an act for the organization of state banks entitled, 'An Act to Provide for the Organization and Government of State Banks,' approved March 10, 1891, and constitutes chapter 27 of the Laws of 1891.

The first section of the Act is as follows: "Associations for carrying on the business of banking under this title may be formed by any number of natural persons—not less than three —one-third of whom shall be residents of the state. They shall enter into articles of association which shall specify in general terms the object for which the association is formed, and may contain any other provisions not inconsistent with law which the association may see fit to adopt for the regulation of its business and the conduct of its affairs. These articles shall be signed by the persons uniting to form the association and a copy of them shall be forwarded to the secretary of state of the state of South Dakota." The second section provides what the certificate of incorporation shall contain, and the third section provides for the manner of its execution, filing, etc. The fourth section confers upon such corporations or associations the following powers: (1) to adopt and use a corporate seal; (2) to have succession for twenty years; (3) to make contracts; (4) to sue and be sued; (5) to elect officers and prescribe their duties; (6) to make by-laws to govern and

[60] 3 S. D. 55, 51 N. W. 858, 15 L. R. A. 477, 44 Am. St. Rep. 756.

control the business; and (7) "to exercise by its board of directors or duly authorized officers or agents, subject to law, all such incidental powers as shall be necessary to carry on the business of banking by discounting and negotiating promissory notes, bills of exchange, drafts and other evidences of debt, by receiving deposits, by buying and selling exchange, coin, and bullion, by loaning money on personal security."

Section 27 provides as follows: "It shall be unlawful for any individual, firm or corporation to continue to transact a banking business or to receive deposits for a period longer than six months immediately after the passage and approval of this Act, without first having complied with and organized under the provisions of this Act. Any person violating the provisions of this section, either individually or as an interested party in any association or corporation, shall be guilty of a misdemeanor and on conviction thereof, be fined not less than five hundred dollars nor more than one thousand dollars, or imprisonment in the county jail not less than ninety days or either or both, at the discretion of the court." These are all the provisions of the law that it is necessary to give to a proper understanding of the questions presented for our decision.

On the 22nd day of September, 1891, the state's attorney filed an information against the defendant in error in the county court of Yankton county containing eleven counts, charging him in the various counts with carrying on the business of banking "by discounting and negotiating promissory notes, bills of exchange, drafts, and other evidences of debt, by receiving deposits, by buying and selling exchange coin, bullion, by loaning money on personal property," without having complied with the provisions of the Banking Act. A demurrer was interposed to each count of the information on the ground that it did not state facts sufficient to constitute a public

offense. The demurrer was sustained by the county court, and judgment rendered quashing the information. The principal ground relied on to sustain the demurrer and judgment of the court below is the unconstitutionality of section 27 of the Act under which the information was filed, and this presents the only question we shall discuss or consider as the other objections to the information were purely technical and, in our opinion, are without merit.

The learned attorney-general contends: first, that the privilege of banking is or may be made by the legislature a franchise, and as such, is subject to the control of the legislature of the state, and that it being a franchise, or made such, the legislature has the power of conferring upon or granting the privilege to such persons, associations, and corporations as it may deem proper, and of excluding all other persons from the exercise of such privilege; and second, if the privilege of banking is not a franchise and can not be made such by the legislature, then the legislature by virtue of the police power vested in the state, may regulate the business and may under such power, prescribe the manner in which the business shall be conducted and may exclude all persons from exercising the privilege of banking, except in the manner prescribed by the law.

The learned counsel for the defendant in error contend: first, that only banking privilege proper, namely: the privilege of issuing demand notes to circulate as money, or as defined in the state constitution: the power "to issue bills or paper credit designed to circulate as money," constitutes, or can by legislative power be made, a franchise, and that carrying on a banking business by exercising the incidental powers of banking specified in subdivision 7 of section 4 of the Act, is a right belonging to the citizens of the country generally, and not a franchise, and can not be made such by legislative power. Second: that under

the police power vested in the state, the legislature may regulate, but it can not prohibit or destroy, a business, calling, or occupation not necessarily offensive to the senses, injurious to the health, or otherwise detrimental to the public interest; that it is only trades, occupations, and pursuits that are at all times. and under all circumstances, necessarily offensive to the community, or injurious to society, that can be absolutely prohibited by legislative action; and that as the business of banking is not of this character, the legislature can not prohibit individuals from pursuing it, though, like all other classes of business, it may be regulated. And, third: they further contend that the Act conflicts with sections 1, 2, and 18 of article 6 of the state constitution and section 1, article 14 of the Constitution of the United States, in that the law makes an unjust discrimination in granting privileges and immunities to citizens, classes, and corporations which upon the same terms are not open to all, in that the law and particularly section 27, is an unlawful interference with the liberty and property of the citizen, in that it discriminates against the individual citizen by conferring upon corporations the right to transact a banking business and prohibiting the same privilege to such individual citizen; and in that the Act deprives the individual citizen of his right to pursue a lawful calling, occupation, or business which is inoffensive and not injurious to the community.

205—*Franchise Distinguished from a Right.*

Are the incidental powers of banking conferred upon corporations by subdivision 7 of section 4 franchises or has the legislature power to make them such, and to prohibit individual citizens from exercising them? What is a franchise? Blackstone defines it as a "royal prerogative or branch of the king's

prerogative, subsisting in the hands of a subject."[61] Chief Justice Taney defines them as follows: "Franchises are special privileges conferred by government upon individuals, which do not belong to citizens of the country generally by common right. It is essential to the character of a franchise that it should be a grant from the sovereign authority and in this country no franchise can be held which is not derived from the law of the state.[62] The qualification by the chief justice, "which does not belong to the citizens of the country generally by common right," is an important one, and constitutes the distinguishing feature of a franchise. What is meant by this qualification is made clear by Mr. Justice Bradley in a recent case decided by the Supreme Court of the United States. After quoting the above definition of a franchise given by Blackstone, he says: "No private person can establish public highway, public ferry, or railroad, or charge tolls for the use of the same, without authority from the legislature, direct or derived. These are franchises. No person can take another's property, even for public use, without such authority, which is the same as to say that the right of eminent domain can be exercised only by virtue of a legislative grant. This is a franchise. No persons can make themselves a body politic without legislative authority; corporate capacity is a franchise."[63]

Of course, as the learned judge says, this list might be continued indefinitely, but this quotation clearly illustrates the nature of a franchise. Over all public property, highways, navigable rivers and seas, over everything that belongs to the sovereign, the power of the government is absolute, whether

[61] 2 Bl. Com. 37.

[62] Bank of Augusta v. Earle, 38 U. S. 13, Pet. 595, 10 L. Ed. 311.

[63] California v. Central Pac. R. Co., 127 U. S. 40, 32 L. Ed. 157.

that power is derived from the common law or from the state or the national Constitution. When, therefore, the state grants a right thus belonging to the government and not to the citizens generally as a matter of right, it is the grant of a franchise. But at common law, banking in all its branches was free to all, and belonged to the citizens of the country generally.

206—Privilege to Issue Currency is a Franchise.

In 1694 the British parliament chartered the Bank of England and conferred upon that bank the power to issue demand notes to circulate as money and prohibited large copartnerships and associations from issuing such notes. By our national Constitution the power to regulate the currency was conferred upon the national government. On the argument of the case of Bank of Augusta v. Earle, supra, Mr. Webster, in the course of his argument, after giving the history of banking in England and in this country, said: "So that the banking privilege of the Bank of England consisted simply in the privilege of issuing notes for circulation, while the privilege is forbidden to all other corporations and all large copartnerships or associations." And in defining banking powers properly belonging to a bank he said: "What is that, then, without which any institution is not a bank, and with which it is a bank? It is the power to issue promissory notes with a view to their circulation as money."

It has long been settled in this country that the privilege of issuing demand notes to circulate as money was a franchise—a public right—belonging to the national government, that might be granted by congress to individuals or corporations, and when not exercised by the national government, be exercised by the state governments. In an early case before the Supreme Court

of the United States, Mr. Justice Story, in a dissenting opinion, said: "The states may create banks as well as other corporations upon private capital, and so far as this prohibition is concerned (the prohibition against emitting bills of credit by the sale) may rightfully authorize them to issue bank bills or notes as currency, subject always to the control of congress whose powers extend to the entire regulation of the currency of the country."[64] This view of the power of the national government to regulate and to provide a national currency and grant the privilege to corporations and to prohibit all not authorized to exercise the franchise, was affirmed by the United States Supreme Court in Veazie Bank v. Fenno[65] wherein the chief justice in delivering the opinion of the court says: "Having thus, in the exercise of undisputed constitutional powers, undertaken to provide a currency for the whole country, it can not be questioned that congress may, constitutionally, secure the benefit of it to the people by appropriate legislation. To this end, congress has denied the quality of legal tender to foreign coins, and has provided by law against the imposition of counterfeit and base coin on the community. To the same end, congress may restrain by suitable enactments, the circulation as money of any notes not issued under its own authority. Without this power, indeed, its attempts to secure a sound and uniform currency for the country must be futile." When, therefore, banking is said to be a franchise, it must, we think, be understood as referring to the privilege of issuing demand notes to circulate as currency. Judge Cooley, in speaking of bank currency, in a note to Cooley's Blackstone, says: "These securities are

64 Briscoe v. Bank of Commonwealth of Kentucky, 36 U. S. 11, Pet. 257, 349, 9 L. Ed. 709, 745.

65 75 U. S. 8 Wall. 533, 19 L. Ed. 482.

designed to circulate as money and they are not allowed to be issued except by persons duly authorized by statute."[66]

"Banking powers" when used in state constitutions, have been construed by several state courts to mean the power to issue notes to circulate as money. It is provided by the constitution of the state of Ohio that "no action of the General Assembly authorizing associations with banking powers shall ever take effect," etc., until submitted to a vote of the people. The supreme court of that state in a late case says: "The statute in question does not assume to authorize the making or issuing of bills or notes to circulate as money, and the question is submitted for our determination whether it is within the meaning of the constitution." After an able discussion of the question, the court concludes that the phrase "associations with banking powers" relates only to banks of issue.[67] The same view was taken of the clause "with banking powers" in the constitution of Illinois;[68] to the same effect is the decision of the Kansas Supreme Court as to the term "banks and currency."[69] Mr. Chief Justice Taney in Bank of Augusta v. Earle, supra, commenting on the case State v. Stebbins[70] says: "We are fully satisfied that the state never intended by its constitution to interfere with the right of purchasing and selling bills of exchange, and that the opinion of the court does not refer to transactions of this description when speaking of banking as a franchise."

We conclude our quotations as to the meaning of the term

[66] 2 Cooley's Bl. Com. 469, note 21.

[67] Dearborn v. North Western Sav. Bank, 42 Ohio. St. 617, 51 Am. Rep. 851.

[68] People v. Loewenthal, 93 Ill. 191.

[69] Pape v. Capitol Bank of Topeka, 20 Kan. 440, 27 Am. Rep. 183.

[70] 1 Stew (Ala.) 312.

franchise as applied to banking powers, by a reference to our own Constitution. All the provisions referring to banking in that instrument are contained in article 18, and embrace three sections. The first is as follows: "If a general banking law shall be enacted, it shall provide for the registry and countersigning by an officer of this state of all bills or paper credit designed to circulate as money, and require security to the full amount thereof to be deposited with the state treasurer in the approved securities of the state or of the United States, to be rated at ten per centum below their par value; and in case of their depreciation, the deficiency shall be made good by depositing additional securities." The second section limits the term of the duration of state banks and section 3 defines the liability of stockholders. It will be observed that the only banking power referred to in the article is the power of issuing "bills or paper credit designed to circulate money." This, then, is the only banking power made a franchise under our constitution. All the other or incidental powers of banking are left to citizens as held by them at common law. And it may be proper to observe that in neither the charter granted by the British parliament to the Bank of England, nor in the National Banking Law of the United States, is there any prohibition of the privilege of carrying on the business of banking, other than issuing demand notes to circulate as money by any individual, copartnership or corporation. These are all left free to pursue the business of banking as specified in section 27 of the Act under consideration. No one will, we apprehend, controvert the proposition that under the common law, banking in all its branches, was absolutely free to all.

207—Citizens Have Rights Which the Sovereign May Not Usurp by Franchise.

We have seen in what manner and when the privilege of issuing bank-bills to circulate as money became a franchise in this country; but as to the other or incidental powers of banking specified in subdivision 7, section 4, we are unable to find that they ever became, either at common law or under the state or national Constitution, a franchise. These are privileges that always belonged to the citizens of the country generally. They never belonged to the sovereign, or pertained to sovereignty in any manner. They have never been conferred upon the national government or the state government. Whence, then, did the legislature of this state derive its power to farm out these privileges to corporations, and to deny to the individual citizen the right to exercise them which he and his ancestors have from time immemorial possessed? Can the legislature create a franchise by depriving citizens of their rights, and then bestow it upon another at will? If it can, then the citizen has no rights that may not be taken from him under this new theory of a franchise created by the legislature. Concede to the legislature the right to make the incidental powers of banking a franchise, under what principle of law can it be deprived of the power of making merchandising, blacksmithing, or farming, a franchise and conferring the privilege upon corporations only? In our opinion, no such power exists in the legislature as that of creating a franchise out of the natural and common rights of the citizens. It must derive such power from the royal prerogatives of the sovereign of that country from whence our system of law is taken, or from the state or national Constitution. In this case no such authority is shown.

Hence we conclude that the individual citizen can not be

deprived of a right always possessed by him—of conducting a banking business and exercising all the privileges of banking except that of issuing currency—and that right conferred upon corporations created by such legislature upon the theory that such a privilege is a franchise. From such an invasion of his rights the citizen is protected by the Constitution of the state. His right to liberty and property is held sacred under that Constitution, and unless he can be deprived of these rights by the lawful exercise of the police power of the state, the prohibition contained in the twenty-seventh section of the Act is unwarranted and void. These constitutional provisions will be discussed more fully under the third proposition of counsel for the defendant in error.

208—*Police Power Defined.*

This brings us to the consideration of the police power of the state. Is it competent for the legislature, under that power, to deprive the individual citizen of his common-law right to carry on the business of banking by discounting paper, buying and selling bills of exchange, receiving deposits and loaning money? The police power is defined by Judge Cooley as follows: "The police power of the state in a comprehensive sense, embraces the whole system of internal regulations by which the state seeks not only to preserve the public order and to prevent offenses against the state, but also to establish for the intercourse of the citizen with citizens, those rules of good manners and good neighborhood which are calculated to prevent a conflict of rights, and to insure to each the uninterrupted enjoyment of his own, so far as it is reasonably consistent with a like enjoyment of rights by others."[71] This power, extending as it

[71] Cooley, Const. Lim. 706.

does to the protection of life, health, comfort, and quiet of all persons, and the protection of all property within the state, is still possessed by the state, subject to the provisions of the constitutions, state and national. According to the maxim—sic utere tuo ut alienum non laedas—it must be within the range of legislative action to define the mode and manner in which one may so use his own rights as not to injure others—subject to the provisions of the constitutions, state and national, and to those great fundamental principals enunciated in the Declaration of Independence.

209—*Business May be Regulated but not Prohibited.*

But under this power it is not competent for the state to prohibit the citizen from carrying on any trade, occupation or business that is not offensive to the community or injurious to society. The business may be regulated, but not prohibited. Mr. Tiedeman in his excellent work on the Limitations of Police Powers, says: "In order to prohibit the prosecution of the trade altogether, the injury to the public which furnishes the justification for such a law must proceed from the inherent character of the business. Where it is possible to conduct the business without harm to the public, all sorts of police regulations may be instituted which may tend to suppress the evil. License may be required, the most rigid system of police regulations may be established, and heavy penalties may be imposed for the infraction of the law; but if the business is not harmful, the prosecution of it can not rightfully be prohibited to one who will conduct the business in a proper and circumspect manner. Such a one "would be deprived of his liberty without due process of law."[72]

[72] Tiedeman Pol. Powers, 290.

Again, the same author says: "It has been demonstrated and satisfactorily explained in its application to a sufficient number of parallel and similar cases in order to lay it down as an invariable rule, that no trade can be subjected to police regulation of any kind unless its prosecution involves some harm or injury to the public or third persons, and in any case the regulation can not extend beyond the evil which is to be restrained. It has also been maintained, and I think satisfactorily established, that no trade can be prohibited altogether unless the evil is inherent in the character of the trade, so that the trade, however conducted, and whatever may be the character of the person engaged in it, must necessarily produce injury upon the public or upon individual third persons."[73] It necessarily follows from the rules above laid down that, if a business is offensive to the community, or injurious to society, and is to be prohibited, it must be prohibited as to all. If it is regulated and controlled, it must be so regulated and controlled as to leave the business or calling free, under such restraints as the legislature may impose, to be exercised alike by all. The government, under the guise of regulation, can not prohibit or destroy. It cannot deprive any citizen of his right to pursue a calling, occupation, or business, not necessarily injurious to the community, who is willing to comply with all reasonable regulations imposed upon it. It can never encroach upon the liberty of the citizen or invade the rights of property protected by the Constitution.[74]

By the Act in question the state admits that banking is not, of itself, injurious to the community, as it confers upon corporations that may be organized under the Act, full power to

[73] Tiedeman Pol. Powers, 301. [74] In Re Jacobs, 98 N. Y. 98, 50 Am. Rep. 636.

carry on the business of banking as provided in the Act; and the number of banking corporations that may be organized is not limited. It also permits individual citizens in towns containing less than 500 inhabitants to exercise the right of banking, as specified in subdivision 7, section 4, under certain regulations in the Act. But by section 27 the state says individual citizens, either as individuals or copartnerships, except in towns of less than 500 population, are in the future prohibited from conducting the business of banking in any of its branches. The artificial persons created by the Act may carry on the business, but no natural person shall be permitted to do so. The banker, therefore, who has devoted years to the acquisition of that knowledge of the business that enables him to conduct it successfully, who has invested his capital in the business of banking, must close his bank, and find other employment for his capital, other occupation in which to employ his talents and abilities, and other methods for providing for the support of himself and family. If the police power of the state is as broad and comprehensive as claimed by the learned attorney-general, the citizen holds his right to liberty, to his property, and to the pursuit of happiness at the will of the legislative power alone.

210—*Individual Rights Guaranteed.*

But the rights of the citizen are not thus left to the will of the law-making power. The state constitution and the national constitution have placed around the rights of the citizen safeguards that protect them from invasion by legislative action. The constitutional provisions more directly bearing upon the questions being discussed are as follows: "No law shall be passed granting to any citizen, class of citizens, or corporations, privileges or immunities which, upon

the same terms, shall not equally belong to all citizens or corporations." Section 1 of the same article is as follows: "All men are born equally free and independent, and have certain inherent rights, among which are those of enjoying and defending life and liberty, of acquiring and protecting property, and the pursuit of happiness." Section 2 of the same article provides: "No person shall be deprived of life, liberty, or property without due process of law." And Section 1, article 14 of the Constitution of the United States provides: "No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the law." These constitutional provisions are not mere "glittering generalities" but constitute sacred guaranties to the citizen that his liberty and his right to the pursuit of happiness shall not be abridged, and his right to his property shall not be invaded by the legislative power, except so far as authorized by the sovereign power as expressed in constitutional provisions, or by due process of law.

What are "privileges and immunities" which the legislature is prohibited from granting to any citizen, class of citizens, or corporations? The most satisfactory definition of this clause that we have noticed is that of Mr. Justice Washington in Corfield v. Coryell.[75] In discussing the clause "privileges and immunities," he said he had "no hesitation in confining these expressions to those privileges and immunities which were in their nature fundamental, which belong of right to citizens of all free governments, and which have at

[75] 4 Wash. C. C. 380.

all times been enjoyed by the citizens of the several states which compose the Union from the time of their becoming free, independent, and sovereign;" and considering these privileges he said they might be "all comprehended under the following general heads: protection by the government; the enjoyment of life and liberty with the right to acquire and possess property of every kind; and to pursue and obtain happiness and safety; subject, nevertheless, to such restraints as the government may justly prescribe for the general good of the whole." In commenting on this opinion, Mr. Justice Field, in his opinion in the slaughter-house cases, said: "This appears to me to be sound construction of the clause in question. The privileges and immunities designated are those which of right belong to the citizens of all free governments. Clearly, among these must be placed the right to pursue a lawful employment in a lawful manner without other restraints than such as equally effect all persons."[76]

By section 27 of the Act we are considering, the privileges and immunities of transacting a banking business, as defined in the Act, are conferred upon corporations alone organized under the Act, except in towns containing less than 500 inhabitants. In all other places the individual citizens are prohibited from transacting such banking business as they cannot—as individuals—comply with the terms of the Act. It is contended that citizens may associate themselves together and become a corporation under the Act, and as such corporation, transact the business. This is true, but can the citizen be required to abandon a business, not necessarily injurious to the community, which he is carrying on and be required to invest his capital in a corporation over which he may have

[76] Slaughter-house cases, 83 U. S. 16 Wall. 97, 21 L. Ed. 415.

no control, except as a mere stockholder, or otherwise be deprived of his right to pursue his lawful calling? Are not these privileges and immunities granted by the Act to corporations, that are denied to individual citizens?

It may be contended that there is no discrimination as between corporations; that all corporations organized under the Act are granted the same privileges and immunities; and that this satisfies the constitutional provision. But this is too narrow a construction of this important constitutional provision intended for the protection of the rights of the citizen. In law, a corporation is a citizen of the state of its creation, and for many purposes a person in law also. When these privileges are conferred upon private corporations, which at common law belong to the citizen, and the same privilege is denied to the individual citizen, this provision of the Constitution, in our opinion, is violated.

211—*Pursuit of Lawful Business is a Right.*

But we shall proceed to consider the other important constitutional provisions contained in the first and second sections of the article. The right of "enjoying and defending life and liberty, of acquiring and protecting property, and the pursuit of happiness," includes the right to pursue any lawful calling, occupation, or business, and the right to choose the means of acquiring property and the pursuit of happiness, not inconsistent with constitutional provisions or the rights of others. The term, "liberty" as used in the Constitution, does not mean mere freedom from arrest or restraint, but it means liberty in a broader and more comprehensive sense. It means freedom of action; freedom in the selection of business, calling or avocation; freedom in the control and use of one's

property so far as its use is not injurious to the community and does not infringe the rights of others; freedom in exercising the rights, privileges and immunities that belong to citizens of the country generally; and freedom in the pursuit of any lawful business or calling selected by him.

Of but little value to the citizen could be these provisions of the Constitution if the state, through the legislative power, could at its mere will and pleasure deprive him of his right to pursue any lawful business or calling not offensive or injurious to the community, which does not interfere with the equal rights of others, and the right to pursue which he has derived from the common law. So too it may be said of that other important constitutional provision: "No person shall be deprived of life, liberty, or property without due process of law." Speaking of this provision, Judge Cooley says: "What the legislature ordains and the Constitution does not prohibit must be lawful. But if the Constitution does no more than to provide that no person shall be deprived of life, liberty, or property except by due process of law, it makes an important provision on this subject, because it is an important part of civil liberty to have the right to follow all lawful employments.[77]

In these constitutional provisions are found the guaranties to the citizen of his right to liberty; his right to the pursuit of happiness; his right to pursue in his own way any lawful business or calling; and his right to property; as well as from those great fundamental principles that underlie our system of government. Mr. Justice Washington, in the case before cited, in speaking of the rights of the citizen independent of constitutional provisions, says: "No proposition is more

[77] Cooley, Torts 277.

firmly settled than that it is one of the fundamental rights and privileges of the American citizen to adopt and follow such lawful industrial pursuits, not injurious to the community, as he may see fit."[78] Mr. Justice Andrews in delivering the opinion of the court in Bertholf v. O'Reilly[79] says: "The right to liberty includes the right to exercise his faculties and to follow a lawful avocation for the support of life."

The case of In re Jacobs[80] deserves more than a passing notice. This case involved the right of a citizen to pursue his ordinary calling, of which the legislature by a law sought to deprive him. An act was passed by the legislature of the state of New York in which it was made unlawful for any person to manufacture cigars, etc., on any floor or part of a floor in a tenement-house occupied as a home. Jacobs was indicted for a violation of the Act and the question presented was "whether or not the Act creating the offense was a constitutional exercise of the legislative power." Mr. Justice Earl in delivering the opinion of the court, discussed very fully the powers of the legislature under the constitution of New York, and the police power of the state. In speaking of "liberty" as used in the constitution, he says: "So, too, one may be deprived of his liberty and his constitutional rights thereto violated, without the actual imprisonment or restraint of his person. Liberty, in its broad sense, as understood in this country, means the right, not only of freedom from actual servitude, imprisonment, or restraint, but the right of one to use his faculties in all lawful ways; to live and work where he will; to earn his livelihood in any

[78] Cornfield v. Coryell, 4 Wash. C. C. 380.

[79] 74 N. Y. 509, 30 Am. Rep. 323.

[80] 98 N. Y. 98, 50 Am. Rep. 636.

lawful calling; and to pursue any lawful trade or avocation. All laws, therefore, which impair or trammel these rights, which limit one in his choice of a trade or profession, or confine him to work or live in a specified locality, or exclude him from his own house, or restrain his otherwise lawful movements, (except as such laws may be passed in the exercise by the legislature of the police power which will be noticed later) are infringements upon his fundamental rights of liberty which are under constitutional protection." The court held the law unconstitutional.

People v. Marx[81] is another important case involving the right of a citizen to carry on the business of manufacturing oleomargarine which the legislature of the state had declared unlawful. The power of the legislature over the business of the citizen was again discussed by Rapallo, J. After quoting the sections of the constitution of that state bearing upon the question, he says: "These constitutional safeguards have been so thoroughly discussed in recent cases that it would be superfluous to do more than refer to the conclusions that have been reached bearing upon the questions under consideration. Among these no proposition is more firmly settled than that it is one of the fundamental rights and privileges of every American citizen to adopt and follow such lawful industrial pursuit, not injurious to the community, as he may see fit." And that law was also held unconstitutional.

In Butchers' U. S. H. & L. S. L. Co. v. Crescent City L. S. L. & S. H. Co.[82] Mr.. Justice Field says that among the inalienable rights as proclaimed in the Declaration of Independence "is the right of men to pursue any lawful business or vocation, in any manner not inconsistent with the

[81] 99 N. Y. 377, 2 N. E. 29. [82] 111 U. S. 746, 28 L. Ed. 585.

equal rights of others which may increase their property or develop their faculties so as to give them their highest enjoyment. The common business and calling of life, the ordinary trades and pursuits, which are innocent in themselves and have been followed in all communities from time immemorial, must, therefore, be free in this country to all alike, upon the same terms. The right to pursue them without let or hindrance, except that which is applied to all persons of the same age, sex, and condition, is a distinguishing privilege of citizens of the United States and an essential element of that freedom which they claim as their birthright." In the same case Mr. Justice Bradley says: "I hold that the liberty of pursuit, the right to follow any of the ordinary callings of life, is one of the privileges of a citizen of the United States," of which he cannot be deprived without invading his rights to liberty within the meaning of the Constitution.

In the slaughter-house cases, supra, Mr. Justice Bradley says: "For the preservation, exercise and enjoyment of these rights the individual citizen, as a necessity, must be left free to adopt such calling, profession, or trade as may seem to him most conducive to that end. Without this right, he cannot be a freeman. This right to choose one's calling is an essential part of that liberty which it is the object of government to protect; and a calling, when chosen, is a man's property and right. Liberty and property are not protected where these rights are arbitrarily assailed."

It will thus be seen that the citizen's right to pursue any lawful business is more than a mere right; it is property that cannot be taken from him "without due process of law." But the law in question does more than deprive a citizen of his occupation. It actually takes from him his right not only to continue the business of banking, but it deprives him of his

property employed in his business. The vaults, safes, and bank furniture of the banker may become comparatively valueless for other purposes. Yet, whatever that loss by diminution in value may be, it is property taken from him without "due process of law." It is not the question of how much or how little the loss to the citizen may be. It is a question of the power of the legislature to deprive a citizen of his property. If the power exists to take any, it would be difficult to fix the limit.[83]

It is further contended that if the business of banking, other than the issue of demand notes to circulate as currency, is not a franchise, and the business cannot be prohibited under the police power, still such banking is affected with a public use, so that it may be regulated by law like public warehouses, as held in Munn v. Illinois.[84] The decision in that case was based upon the principle that all shippers of grain through the city of Chicago were of necessity compelled to make use of the warehouses of the city as a means of transshipment of the same. These warehouses stood "in the gateway of commerce," and their owners exacted toll of all who were thus of necessity compelled to use them. Certainly such a business might well be held to be clothed with a public interest, and like the business of the innkeeper, common carrier, miller, etc., subject to the control of the state.

But the state of Illinois did not prohibit any citizen from carrying on the warehouse business. It subjected those engaged in the business to such regulations as the state deemed necessary by requiring warehousemen to take out a license, give bond, etc. We are unable to discover any similarity between

[83] Millett v. People, 117 Ill. 294, 5 West. Rep. 155.

[84] 94 U. S. 113, 24 L. Ed. 77.

the business of the private banker in discounting paper, buying and selling exchange, loaning money, or receiving deposits; and warehousemen, common carriers, innkeepers, etc. No one is required to do business with a private banker, any more than with the merchant or the manufacturer. But, assuming that the business of banking we are now considering is clothed with such public use that it may be controlled by the state (and we think it is so affected with a public interest), still it does not follow that the citizen may be deprived of the right to carry on the business. This, like any other business, may be subjected to reasonable regulations which shall alike apply to all citizens and corporations.

The attorney general relies mainly for a reversal of the judgment of the court below upon the authority of Morse on Banks and Banking, 3d ed. Section 13, and the cases referred to by him and the decision of the Supreme Court of North Dakota.[85] The cases cited by Mr. Morse as supporting the propositions laid down by him are mainly cases decided in the State of New York, and all except Curtis v. Leavitt,[86] were decided over half a century ago. Assuming that they do support the propositions laid down by Mr. Morse (of which, after a careful examination, we are left somewhat in doubt), still we do not think that these authorities should control this court in the decision of this case. Neither the constitutional provisions in force in that state, nor the laws under which the decisions were made, are accessible to us and hence we are unable to determine what they were. In neither of the cases cited was the constitutionality of the laws then being considered raised or passed upon by the court. It would also

[85] State v. Woodmanse, 1 N. D. 246, 11 L. R. A. 420, 46 N. W. 971.

[86] 15 N. Y. 9.

seem from the decisions that private banking was neither prohibited nor restrained at that time.[87]

In 1837 all laws restraining banking, except as to the issuing of demand notes intended to circulate as money, were repealed.[87a] Since those early decisions in New York, the rights of individual citizens to engage in and carry on any lawful pursuit or calling, and the limitations imposed upon the legislative power by the provisions contained in the more modern constitutions, have been very fully discussed and considered in numerous cases, both in the state and federal courts, and the principles governing the rights of individuals and the legislative power over such rights, have become quite well settled. The earlier New York cases—if they assert the doctrine claimed for them—could hardly be reconciled with the later cases of In Re Jacobs and People v. Marx, supra, as to the right of the citizen to pursue any lawful business, subject only to proper regulations by the legislature. The case of Nance v. Hemphill[88] and the case cited from Texas[89] have not been examined by us. We conclude, however, that as digested, they are not very important to the decision of this case. The only modern case that seems to support the position of the attorney general is that of State v. Woodmanse, supra. But, notwithstanding our very high appreciation of the decisions of that court, we are unable to reach the same conclusions that that court has arrived at upon the constitutionality of a law which is said to be quite similar to the one now before us.

Our conclusions are that the legislature exceeded its powers in attempting to prohibit all individual citizens of this

87 Briston v. Barker, 14 Johns 205.

87a Curtis v. Leavitt, 15 N. Y. 9.

88 1 Ala. 551.

89 State v. Williams, 8 Tex. 255.

state from continuing to carry on the business of banking as conferred upon corporations by subdivision 7, section 4 of the Act under consideration; and that section 27 of said Act which provides that "it shall be unlawful for any individual, firms, or corporations to continue to transact a banking business, or to receive deposits," etc., "without first having complied with the provisions of this act," so far as said Act affects individual citizens, is in conflict with the provisions of the constitution of this State, and therefore void. This decision is not intended to affect in any manner the remaining provisions of said Act, or of said section 27, except so far as it prohibits any individual or firm from transacting such banking business as is authorized by the Act; that being the only question raised in this case or considered by the court. The judgment of the court below is affirmed; and all the judges concur."

The trust is a creature of contract; endowed with the same protection under our constitution and the laws as a citizen; with rights the same as an individual; beholding in no respect to a privilege or franchise from the state. From the many decisions on "rights" cited in the foregoing chapter, we may conclude that the right of the trust or the individual to engage in all lawful business wherein a franchise is not involved, will continue as long as our present form of government exists.

CHAPTER XXI.

ESSENTIALS IN PREPARING TRUST INSTRUMENT.

In drawing a trust instrument certain fundamentals should be kept in mind, such as trust property, elements of,[1] duration of, the rule against perpetuities, seal, purpose of, beneficial interests, committee of beneficiaries, liability—personal and partnership. There are cases where alleged trusts have been adjudged partnerships or associations, the cause for such construction may be found in the instrument itself. A purported declaration of trust may, in fact, create a partnership because elementary principles of law have not been observed in drafting the instrument. The essentials of a trust must be embodied in the declaration, and where this is done the courts will construe it a pure trust.[2] Following is an outline of some of the general principles necessary to the creation of a pure trust:

212—*Trust Property.*

One of the first essentials of a trust is property or property rights.[3] The fact that an association may be created without any property distinguishes it from a trust. The writer has examined a number of these so-called trusts which were not based on property or property rights. Should a trust of this character come up for judicial construction, it would be impossible for the courts to adjudicate it a trust, for irrespective of what the parties intended, it would lack a fundamental prin-

[1] See Elements par. 6. 25-27.
[2] See Trust as an Entity par. [3] See Trust Property par. 43.

ciple of the trust. Property may be described in the body of the instrument, or it may be set out in a schedule which is made a part of the trust.

213—*Duration of Trust.*

The life of the trust should be specifically provided for, and this portion of the instrument should not offend the rule against perpetuities,[4] which is a life or lives in being and twenty-one years thereafter. A trust may be drawn for a period not to exceed twenty-one years. If a longer period is desired, a provision may be inserted to the effect that the trust is to continue during the lives of the trustees named at the creation of the deed, and for twenty-one years after the death of the last original trustee. At this juncture, provision should be made for the proper disposition of the property at the time of termination of the trust, or when the mission of the trust has been fulfilled.[5]

214—*Seal.*

Trustees may use a seal to give more formality to their acts if they so desire, but to do this they must be so empowered in the trust instrument.

215—*Purpose of Trust.*

The business, trade, commerce or endeavor to be carried on under the trust agreement should be stated in unambiguous terms. It is good practice to insert a further provision giving power to the trustees to do any and all things necessary to carry out the spirit of the trust, for without this they would have no

[4] See Rule Against Perpetuities Par. 16.

[5] See Termination of Trust Instrument Par. 15.

authority to do anything beyond what is specifically set forth and what is necessarily implied.[6]

216—Beneficial Interests.

The trust property is held whole by the trustees for the beneficiaries; it is not subject to division, but the mass, i. e., all of the trust property may be represented by so many beneficial interests which may have a fixed par value, or the property may be evidenced by a certain number of beneficial interests of no par value. If certificates[7] are to be issued to the owners of beneficial interests, a copy of a certificate should be made a part of the deed of trust. These interests are personal property and the trust instrument should so state.[8] Certificates may be sold and assigned the same as any other personal property; and provision should be made for such sale and transfer, and for proper recording with the trustees.

217—Committee of Beneficiaries.

It should be made clear in the trust deed that the trustees have full title to all property; that they are free in all their acts and undertakings; and that they are in no way subject to dictation from the beneficiaries. It is prudent to provide for meetings of the beneficiaries at certain stated periods. Provision may also be made for the beneficiaries at their meetings to elect a committee whose duties should be to act in an advisory capacity to the trustees; in this way the beneficiaries could act as a unit and a closer relationship would be maintained between them

[6] See For What Purpose a Trust May be Created Par. 4.

[7] See Certificates Par. 57 to 65.

[8] See Shareholders Interest Personal Property Par. 55-56.

and the trustees. The committee could audit the trustees' books and could see that the trust was properly carried out, that there was no waste or loss, and no needless expense. The committee could report their findings from time to time to the beneficiaries and give their recommendations. In this connection it may be observed that this committee must not be given any power in the declaration of trust over the trustee, other than that of advisory.

218—*Partnership Liability.*

The chief factor in determining whether a pure trust has been created or not is the extent of the power given the beneficiaries. The general rule is that where the trustees are in any manner limited in their actions by the will of the beneficiaries, then a partnership is created and not a trust.[9] But where the trustees have title to all trust property and are not subject to dictation from the beneficiaries then a pure trust is created and there is no partnership liability. It should be made clear in the declaration of trust that the trustees are uncontrolled by the beneficiaries.

219—*Liability Limited.*

The trust property should be made to respond to all debt and damages.[10] The trustees being fiduciaries should be held free from liability by special provision in the declaration of trust.[11] In addition to their liability being limited to the property and

[9] See Trusts Distinguished from other Organizations: Not a Partnership Par. 140 to 149. Also Partnership liability not Applicable to Beneficiaries Par. 116.

[10] See Liability of Trust Property Par. 48.

[11] See Limitation of Trustees' Liability Par. 123.

assets of the trust, all contracts should carry a provision showing that the trustees' liability is restricted, and that they contract as trustees, and not as individuals. This should be done for the reason that all parties should have notice with whom they deal.

APPENDIX.

The copies of trust agreements herein set out are presented with the view of giving ideas and suggestions to those who contemplate writing trust deeds.

These have been selected because of the variety of business conducted under a declaration of trust. Most of them have been before the courts; the citations are given so that the decisions may be further consulted if so desired.

EXHIBITS.

THE WACHUSETT REALTY TRUST.

DECLARATION.

The Wachusett Realty Trust was upheld by the United States Supreme Court as a trust. In this case the court held that the trust was not an association, but was in fact a pure trust. It is reported as Crocker v. Malley, 249 U. S. 223; 39 Sup. Ct. Rep. 270; 63 L. Ed. 573; 2 A. L. R. 1601.

KNOW ALL MEN BY THESE PRESENTS, That we, Alvah Crocker and Charles T. Crocker both of Fitchburg, in the Commonwealth of Massachusetts, John J. Riker of the City and State of New York, Samuel E. M. Crocker of said Fitchburg, and Felix Rackemann of Milton in said Commonwealth, the grantees named in a certain deed from the Crocker, Burbank & Co., Inc., (Maine Corporation), dated this day by which deed there are conveyed to us certain lands and buildings situate in the City of Fitchburg in the Commonwealth of Massachusetts, hereby declare and agree that we will, and our heirs and successors shall, hold said granted premises, and all other funds and property at any time transferred to and received by the Trustees hereunder, for the purposes, with the powers, and subject to the provisions hereof, for the benefit of the cestui que trusts (who shall be trust beneficiaries only, without partnership, associate or any other relation whatever inter sese), and upon the trusts following, viz:

1. In trust to convert the same into money and distribute the net proceeds thereof among the persons at the time of such conversion holding and owning beneficial interests therein, as evidenced by the receipt certificates issued by the Trustees as hereinafter provided; it being however expressly understood and agreed that the Trustees may, in their uncontrolled discretion, defer or postpone such conversion and distribution, except that the same shall not be postponed beyond the end of twenty years from and after the death of the last survivor of the persons named and described in the last paragraph hereof. During such postponement, and until such conversion, the interests of the cestui que trusts shall be considered for purposes of transmission and otherwise as personal property.

2. In trust, pending final conversion and distribution of the property, to manage and control the same, the Trustees having, for such purposes and for all purposes of sale, lease, mortgage, exchange, improvement and development, and any and all arrangements, contracts and dispositions of the trust property, or any part thereof, all and as full discretionary powers and authority as they would have if they were themselves the sole and absolute beneficial owners thereof in fee simple

3. In trust to collect and receive all rents and income from the property, and semi-annually or oftener at their convenience, to distribute such portion thereof as they may, in their discretion, determine to be fairly distributable net income, to and among the several cestui que trusts according to their respective fractional interests, the Trustees in this connection having full authority from time to time to use any funds on hand, whether received as capital or income, for purposes of any repair, improvement, protection or development of the property held hereunder, or the acquisition of other property as the Trustees may determine to be wise and expedient, for the protection and

development of the trust property as a whole pending its conversion and distribution. The determinations of the Trustees, made in good faith, as to all questions as between "capital" and "income" shall be final.

4. The said Crocker, Burbank & Co. Inc. (Maine Company) having determined to wind up its affairs and be dissolved, without waiting for final cash sale of its real estate, this trust is declared in favor, and for the benefit of the eight shareholders of said Maine corporation, according to their respective fractional interests, to whom the Trustees shall issue proper receipt certificates, which certificates, and all others which may be hereafter issued in exchange or substitution therefor, shall be deemed parts hereof and conclusively evidence the ownership of respective interests in this trust; and the Trustees shall, from time to time, on request, (on surrender of the old) issue such new certificates as may be proper and necessary to evidence any new or sub-divided interests.

5. The Trustees shall have authority to borrow money and fix the terms of any loans, and give any pledge, mortgage or other security which they may deem wise. No purchaser from or lender to the Trustees shall ever have any liability to see to the application of any proceeds.

6. The Trustees may employ all such agents and attorneys as they may think proper and find expedient, and prescribe their powers and duties, and shall not be personally responsible for any misconduct, errors or omissions of such agents or attorneys employed and retained with reasonable care.

7. The Trustees shall at all times keep full and proper books of account and records of their proceedings and doings, and shall, at least annually, render account of the trust to any beneficiary requesting the same, but no Trustee serving hereunder shall be obliged to give any bond, nor shall any Trustee have

any liability except for the results of his own gross negligence or bad faith.

8. The recording of this instrument shall be at such times and in such places as the Trustees may in their discretion, determine to be necessary or expedient, and they shall in like manner determine the form and record of all muniments of title.

9. The Trustees shall have full power at any time, pending final termination of this trust, to transfer the whole or any part of the property then held by them hereunder to any corporation which they may acquire or cause to be organized for the more convenient or expedient holding or management of the property, taking any securities issued by such corporation in exchange and payment therefor, and the Trustees, or any of them, may at any time be or become directors or officers of any corporation any shares of which are held by them.

10. The Trustees shall be entitled to receive reasonable compensation for service not exceeding a total of one per cent reckoned upon the gross income received by them as such, unless, at any time, a majority in interest of the cestui que trusts consent in writing to some larger compensation for any past service. The Trustees shall also be entitled to reimbursement and indemnification from the trust property for all their proper expenses and liabilities, and shall be entitled at all times to the advice of counsel; and traveling expenses to and from any meetings of the Trustees shall be considered proper expenses.

11. Any Trustee hereunder may resign by written instrument duly acknowledged and attached to the original of this instrument, or recorded with Worcester County (North District) Deeds if the original hereof be then there recorded.

Any vacancy in the office of the Trustee, however occasioned, shall be filled by the remaining Trustees by an instrument in

writing, signed by them and assented to in writing, by the holder or holders of a majority in amount of the beneficial interests herein, such appointment to be in like manner attached to the original of this instrument, or recorded as in the case of resignation last above provided for.

12. If, at any time or times, a majority of the Trustees hereunder shall certify in writing that the remaining Trustees are either absent from the Commonwealth of Massachusetts or incapacitated through illness or otherwise, from acting, then such majority shall, at such time or times, have, and may exercise, any and all the powers of the Trustees hereunder with like effect as if similarly exercised by all.

13. The terms and provisions of this trust may be modified at any time or times by instrument in writing, signed, sealed and acknowledged by the then Trustees, assented to in writing by a majority in interest of the cestui que trusts, and attached to the original of this instrument, or recorded with Worcester County (North District) Deeds if the original hereof be then there recorded.

14. The certificate in writing of the Trustees as to any resignation from the office of Trustee hereunder and as to the appointment of any new trustees hereunder and as to the existence or non-existence of any modifications hereof, may always be relied upon, and shall always be conclusive evidence in favor of all persons dealing in good faith with said Trustees in reliance upon such certificate.

15. The title of this trust, (fixed for convenience) shall be "The Wachusett Realty Trust," and the term "Trustees" in this instrument shall be deemed to include the original and all successor trustees.

16. At the end of twenty years from and after the death of the last survivor of said Charles T. Crocker, Samuel E. M.

Crocker and Alvah Crocker, and of the lawful issue now living of any of them (unless this trust shall theretofore have been otherwise lawfully terminated), all the property of every kind then held hereunder shall be sold by the Trustees and equitable distribution made of the net proceeds among the persons then entitled.

IN WITNESS WHEREOF we have hereunto set our hands and common seal on this 29th day of March in the year nineteen hundred and twelve.

Executed in duplicate

Alvah Crocker
Charles T. Crocker (Seal)
John. J. Riker
Sam. E. M. Crocker
Felix Rackemann

Commonwealth of Massachusetts.

Worcester, ss. March 29., 1912. Then personally appeared the above named Alvah Crocker and acknowledged the foregoing instrument to be his free act and deed, Before me,

Chas. A. Morgan, Justice of the Peace.

Received March 29, 1912 at 3 h. 10 m. P. M. Entered & Examined.

DAVIS COGGINS OIL CO.

This trust, was in litigation in the Texas courts, 225 S. W. 73 and there the trust agreement was upheld as such. The court in substance says that a trust was created by the instrument and not a partnership, the trust reads as follows:

Articles of Agreement.

STATE OF TEXAS
COUNTY OF WICHITA

This Agreement made this the 4th day of January 1918, by and between J C Davis, B F Coggins, J Fred Smith, A C Parker and W F Reynolds together with their assigns, hereinafter designated as "Subscribers" and J C Davis, B F Coggins and J Fred Smith, together with their successors, hereinafter designated as "Trustees" Witnesseth:

That, whereas, the subscribers have transferred, conveyed and delivered and by these presents do transfer convey and deliver to the trustees under the designation of the Davis Coggins Oil Co. all the rights, interest and privileges acquired by said subscribers or any of them, or their assigns, to prospect for, develop and sell oil and minerals on any part or on all of the following tracts of land, to wit; 80 acres out of M Powell Survey: Eighty acres of land out of the M Powell Survey said tract being that lease originally made by C Birk to W Newton Maer on the 25th day of May 1917, of record in Book 84, page 522 of the deed Records of Wichita County, Texas, and more fully described as follows;

Starting at a point 672 vrs. South of the Southeast corner of the Wm Kepler Survey; Thence S 336 vrs. Thence W 1344 vrs; thence N 336 vrs; Thence E 1344 vrs. to the place

of beginning, said lease being situated in Wichita County, Texas.

200 acres out of the Amazon Huston Survey Lying and being situated in Wichita County, Texas, and being 200 acres of land out of a 372 acre tract in said County and bounded as follows; Out of the Amazon Huston Survey more commonly called the James A Ventress Abstract No 103, Cert No 882, with field notes as follows; beginning at the Southwest corner of said Amazon Huston Survey which is also the Southeast corner of the William Graves Survey: Thence down the Wichita River as follows; N 66½ E 188 vrs; N 74 E 278 vrs. South 87 E 258 vrs, a stake on the river bank; the same being the S E Corner of said Amazon Huston Survey; thence North 2091 vrs a stone; thence West 966 vrs a stone thence South 2358 vrs. to the place of beginning, this description and field notes is for the entire 372 acres and is known as Block No 23 of Cowherd Subdivision in Wichita County, Texas the 200 acres herein transferred is and understood to be the 200 acres off of the North end of the above described 372 acre tract, and to contain 200 acres of land and no more.

120 acres out of the S A & M G Ry; 120 acres of land out of the North East one fourth (¼) of Section No Two (2) S A & M G Ry Survey, same being all of said ¼ section, except 40 acres heretofore leased to Porter Farrell and being the same land conveyed to W T Waggoner by W F George.

And reference is made to the lease or contracts covering above described tracts of land, for the terms of same; and whereas the trustees for the purpose of defining the interest of the subscribers and their assigns in said property, have issued to the subscribers, in proportion to their several interests negotiable certificates or evidences of interest as cestuis

que trustent to the number of two thousand (2,000) shares, of the part value of one hundred ($100.00) dollars, each.

Now, Therefore the trustees hereby declare that they accept and hold the property above described so transferred to them, as well as all other property which may hereafter be transferred to them, or which they may acquire as such trustees, together with the proceeds thereof, and all monies and securities accruing therefrom hereafter received by them in trust as joint tenants and not as tenants in common to manage, invest, reinvest and dispose of the same, and to collect receive and distribute the income and profits therefrom for the benefit of the holders, from time to time of the certificates of shares from time to time, issued and outstanding hereunder, in the manner and subject to the stipulations and limitations herein contained, to-wit;

(1) The Trustees in their collective capacity and so far as practicable and convenient, shall be designated by, and shall act under the name of the Davis Coggins Oil Co. and under that name, so far as practicable, shall conduct all business and execute all instruments in writing in performance of their trust.

(2) The said Trustees shall always be three in number, unless their number shall be changed by an amendment of these articles of agreement adopted in the manner hereinafter prescribed and the said J C Davis shall hold office until their annual meeting of the shareholders, and the said B F Coggins shall hold office until the second annual meeting of the shareholders, and the said J Fred Smith shall hold office until the first annual meeting of the shareholders, except that all of said trustees, as well as any trustee hereafter elected, shall in all cases hold office until their successors have been elected and accepted this trust.

The shareholders at each annual meeting or adjournment thereof, shall elect the required number of trustees to fill all vacancies occurring in the Board of Trustees, by resignation inability to act, failure to accept this trust, or expiration of term of office, and trustees so elected shall serve for a period of three years the Board of Trustees, however, shall fill all vacancies occuring ad interim and the trustees so selected shall hold office until the next annual meeting of the shareholders.

(3) Shareholders in said company shall have no legal right to the trust property, either real or personal or any character held from time to time by the Trustees; and especially shall they have no right to call for any partition of the trust property or dissolution of the trust, but the shares shall be personal property carrying the right of division of the profits, and, at the termination of said trust, resulting either from the expiration of the period fixed for its existence or from the dissolution of the company otherwise effected, the division of the principal and profits.

(4) The death, insolvency or bankruptcy of a shareholder, the transfer of his interest by sale, gift, devise, descent or otherwise during the continuance of said trust, shall not operate as a dissolution of said Company or terminate the trust, nor shall it have any effect whatsoever upon the company, its operation or mode of business; nor shall it entitle his heirs, assigns, or representatives to an account or to take any action in the courts, in law or equity against the company, its members, trustees, officers, or its property, or business operations which shall remain intact and undisturbed thereby but they shall simply and only succeed to the rights of the original member of shareholders.

(5) The Trustees shall have and exercise the exclusive

management and control of all property at any time belonging to this trust, with all the rights and powers of absolute owners thereof, subject only to the purposes of this agreement, they may adopt constitution and By laws, not inconsistent with these articles of agreement, or the laws of this State or of the United States and adopt and use a common seal; they shall have the power to vote in person or by proxy any stock belonging to the trust and to collect, receive and receipt for the dividends thereof; to contract with any and all companies in which they may hold stock as trustees in respect to any matters or matters relating to the business of any such company or companies; to collect, receive, sue for, and receipt for, all sums of money at any time coming due to said trust; to employ counsel; to begin, prosecute and settle suits at law in equity or otherwise and to compromise or refer to arbitration in favor of or against the Trustees.

(6) The Trustees shall by a vote of a majority of the Board have full power to do all things in their judgement necessary and prudent in the management and conduct of the business of the Trust, same being the manufacture and sale of the products of petroleum the production of oil, gas or other minerals, the transportation of the same or of any of the manufactured products thereof; and the engaging in the general merchandise of said articles, or the doing of either or any of said things, or anything properly incident thereto and further, in the conduct of the business to execute contracts in the name of the Davis Coggins Oil Co. or in names of the trustese, as may be necessary or convenient; to purchase, contract for, lease or otherwise acquire such property, make such repairs, extensions and additions as they may deem necessary or proper, to sell and convey any part of the property of the Trust; to borrow money on the credit of the

Trust, and if in their judgmement necessary or advisable, issue mortgage debentures therefor, secured by a mortgage or deed of trust upon the property of the trust, executed upon such terms as they may deem proper: and generally to do all things they may deem necessary or advisable for the successful management of the business and affairs of the trust.

(7) At any meeting of the shareholders at which a majority of the shares are present or represented they may, by a vote of the holders of a majority of the shares present advise the trustees as to the management of the business of the Company or upon any subject which may be pending but no advice or instructions so given shall in any way impair or defeat the powers herein conferred.

(8) The Trustees, the survivor or survivors of them, their successors and their survivor or survivors, shall have no power to bind the shareholders personally, and in every written contract they shall enter into, reference shall be made to this declaration of trust, and the person firm or corporation so contracting with them, shall look only to the funds and property of the Company under said contract and for the payment of any debt, damage, judgment or decree, or of any money that may become due and payable in any way by reason thereof; and neither any trustees, nor the shareholders present or future, shall be personally liable therefor, or for any debt incurred, or engagement or contract made by the Board of Trustees or any officer agent or servant, acting under them on behalf of the company.

The funds and property of the company shall stand primarily charged with the burden of paying any claim or money demand established or existing on account of the operations and business of the company whether founded on contract

or tort to the end that the members, of the company may be protected from personal liability.

(8) In all deeds and conveyances to said trustees, or any of them, or to their successors or any of them, it shall be set forth that such grant, conveyance or transfer is to him or them as Trustees of the Davis Coggins Oil Co. to be held subject to this Declaration of trust.

(9) The company may sue or be sued in the Company's name as provided by law; or suit may be brought or defended in the names of the trustees.

(10) Stated meetings of the trustees shall be held as they may from time to time, by vote or by law, prescribe, and other meetings shall be held from time to time upon the call of the president or three trustees. A majority of the board shall constitute a quorum. and the concurrence of all the trustees shall not be necessary to the validity of any action done by them, but the wish of the majority of the trustees present and voting at any meeting as evidenced by a resolution of such majority shall be conclusive and the trustees may make adopt amend or repeal any such by laws, rules and regulations not inconsistent with the terms of this instrument or the laws of this state or of the United States, as they may deem necessary or desirable for the conduct of their business and for the government of themselves and their agents, servants and representatives.

(11) Trustees shall elect from among their number a president and vice president of the board, and shall also elect a secretary treasurer and they shall have authority to appoint such other officers agents and attorneys as they may from time to time deem necessary or expedient, and they shall have authority to accept resignations and to fill any vacancies, and shall likewise have authority to elect temporary officers to

serve during the absence or disability of regular officers, and the duties of the offices so created shall be such as are prescribed in the by laws, rules, and regulations adopted by the trustees.

(12) The Trustees shall not be liable for errors of judgment either in holding property originally conveyed to them or in acquiring and afterwards holding additional property, nor for any loss arising out of any investment, nor for any act, or omission to act, perform or omitted by them, in the execution of this trust in good faith, nor shall they or any or either of them, be liable for the acts or omission of such other, or of any officer, agent or servant appointed by or acting for them, and they shall not be obliged to give any bond to secure the due performance of this trust by them.

(13) The shares herein provided for may be divided into preferred and common shares, The preferred shares shall entitle the holder to such dividends, payable at such time, as the trustees may specify, and they may also provide that in case of liquidation the proceeds of the liquidation shall be first applied to the payment of registered holders of preferred shares, and any accrued and unpaid dividends thereon and that the balance remaining thereafter shall be divided among the registered holder of common shares. As evidence of the ownership of said shares, the trustees shall cause to be issued to each shareholder a negotiable certificate or certificates, which certificates shall be in such form as they may prescribe, but such certificate shall only evidence, the interest that the holder thereof has in the property belonging to this trust, to be held subject to the articles of this agreement, and such by laws rules and regulations as the trustees may hereafter adopt.

(14) The fiscal years of this Trust shall end on the first Monday of January of each year. Annual meetings for the

election of the trustees and for the transaction of other business shall be held in the town of Wichita Falls, Texas, on the first Monday of January in each year beginning with the first Monday of January 1918, of which meetings notice shall be given by the Secretary by mail, to each shareholder, at his registered address, at least ten days before such meeting.

(15) Special meetings of the shareholders may be called at any time, after ten days, notice, given by order of the President or two trustees. At all meetings of the shareholders, each holder of the common shares shall be entitled to one vote for each share held by him, and any shareholder may vote by proxy, but the holder of preferred stock shall not have the voting privilege.

No special business shall be transacted at any meeting of the shareholders, unless notice of such business has been given in the call for the meeting.

No business except to adjourn shall be transacted at any meeting of the shareholders unless the holders of a majority of all the common shares outstanding are present in person or by proxy.

(16) This trust shall continue for the term of 21 years after the death of the last survivor of the said J C Davis, B F Coggins and J Fred Smith, at which time the then board of trustees shall proceed to wind up its affairs, liquidate its assets, and distribute the same among the holders of preferred and common shares according to the priorities hereinbefore expressed; provided, however, that if prior to the expiration of said period, the holders of at least two thirds of the shares then outstanding, shall, at a meeting called for that purpose vote to terminate or renew this trust, then said trust shall either terminate or be renewed and continue in existence for such further period as may then be determined, not incon-

sistent with the laws of this State or of the United States.

Provided further however, that upon request of the holders, of at least two thirds of the shares of the common stock outstanding by vote or resolution thereof at a meeting of the shareholders called for that purpose the trustees may, if it seems to them judicious so to do, convey the trust property to new or other trustees, subject to the terms of such request and in the manner stated therein being first duly indemnified for any outstanding obligations provided further, however, that nothing in this provision contained shall be construed as making it obligatory upon the trustees to comply with such request. For the purpose of winding up its affairs and liquidating the assets of the trust the then board of trustees shall continue in office until such duties have been duly performed.

(17) This Agreement and Declaration of Trust may be amended or altered except as regards the liabilities of the trustees, with the consent of the holders of at least two thirds of the shares of the common stock outstanding, provided notice of the proposed amendment or alteration shall be given in the call for the meeting, and in case of such alteration or amendment, the same shall be attached to and made a part of this agreement.

(18) This instrument as well as any amendment thereto shall be recorded in any county or counties in which the trustees shall undertake to do business, and the trustees shall sign and acknowledge the Constitution and By laws and all amendments thereto in the form prescribed by laws to entitle them to registration, and the same may be recorded in any County or counties in which the trustees undertake to do business, whenever, they deem it necessary or advisable to do so.

In Witness Whereof we the Subscribers and we the Trus-

tees hereto sign our names, this the 4th day of January 1918.

J C Davis
B F Coggins
J Fred Smith
A C Parker
W F Reynolds, Subscribers.

J. C. Davis
B. F. Coggins
J Fred Smith, Trustees.

THE STATE OF TEXAS
COUNTY OF WICHITA

Before me, the undersigned authority, on this day personally appeared J C Davis, J Fred Smith and A C Parker and W. F. Reynolds, known to me to be the persons whose names are subscribed to the foregoing instrument, and acknowledged to me that they executed the same for the purposes and consideration therein expressed, in the capacity therein stated.

Given under my hand and seal of office this the 4th day of January 1918.

(seal)

Jas A Griffin, Notary Public
Wichita County, Texas.

THE STATE OE TEXAS
COUNTY OF WICHITA

Before me, the undersigned authority, on this day personally appeared B F Coggins known to me to be the person whose name is subscribed to the foregoing instrument, and acknowledged to me that he executed the same for the purposes and consideration therein expressed, in the capacity therein stated.

Given under my hand and seal of office this the 21st day of January 1918.

(seal)

Edna Doke, Notary Public,
Wichita County, Texas.

THE PEPPERELL MANUFACTURING CO.

THIS AGREEMENT AND DECLARATION OF TRUST made this fifteenth day of March, A. D. 1915, at Biddeford, in the State of Maine, (Malley & Bowditch, 259 Fed. 809, 7 A. L. R. 608).

WITNESSETH:

PREAMBLE.

THAT WHEREAS the stockholders and directors of PEPPERELL MANUFACTURING COMPANY, a Maine Corporation carrying on business at Biddeford, in the State of Maine, deem it for the advantage of the interests in said company and business to transfer the property and assets of said company to a trust organized in accordance with the provisions of this agreement, and have passed such votes and done such acts and things as are required to authorize such transfer; and

WHEREAS by deed of even date herewith and to be recorded, and by other instruments of assignment and transfer said property and assets have been conveyed and transferred to James Longley, Charles P. Bowditch, Francis C. Welch, George Wigglesworth, Philip Dexter, Philip Y. De Normandie, and William Amory, as trustees hereunder, to which deeds and instruments of assignment and conveyance reference is hereby made for a more particular description of said property and assets;

DECLARATION OF TRUST.

NOW THEREFORE we, the said James Longley, Charles P. Bowditch, Francis C. Welch, George Wigglesworth, Philip Dexter, Philip Y. De Normandie, and William Amory, do here-

by, for ourselves and our heirs, executors, administrators and assigns and our successors, as trustees hereunder, declare and agree that we will hold the said property as well as all other property which we may acquire as trustees hereunder together with all proceeds and earnings thereof upon and for the trusts, uses and purposes herein set out:

NAME.

1. The name of this trust shall be Pepperell Manufacturing Company and the trustees may be so designated, and in that name the trustees shall, so far as practicable, conduct the business of the trust and execute all instruments in writing. Any property conveyed to the trustees under the above designation or as trustees of said Company shall be held by them as joint tenants as trustees under this instrument.

CAPITAL.

2. The capital of this trust shall be seven million six hundred and sixty-eight thousand dollars ($7,668,000) divided for the purpose of issuing certificates into 76,680 shares of the par value of one hundred dollars ($100) each.

CERTIFICATES.

The holders of said shares shall be entitled as evidence thereof to certificates executed and delivered by the trustees in substantially the form following, namely:

PEPPERELL MANUFACTURING COMPANY.

(Issued under Agreement and Declaration of Trust dated March 15, 1915.)

No. Shares.

This is to certify that is the owner of shares of the par value of one hundred dollars ($100) each of the Pepperell Manufacturing Company, subject to the provisions of an Agreement and Declaration of Trust dated March 15, 1915, and on file with Saco and Biddeford Savings Institution in Saco, Maine, which is hereby referred to and made a part of this certificate.

This certificate is transferable only subject to the provisions of said Agreement and Declaration of Trust and only by transfer upon the books of the Trustees upon surrender of this certificate properly endorsed. This certificate is not valid until countersigned by Boston Safe Deposit and Trust Company, Transfer Agent, which signs merely to indicate that the shares represented by this and all other outstanding certificates bearing its signature do not exceed the total shares herein authorized.

IN WITNESS WHEREOF the Trustees under said Agreement and Declaration of Trust have caused the name of said Trust to be signed hereto and its common seal to be hereto affixed by their President, and attested by their Treasurer, this day of A. D. 19 .

PEPPERELL MANUFACTURING COMPANY,
By

President.

Attest:

Treasurer.

Countersigned:
BOSTON SAFE DEPOSIT AND TRUST COMPANY,
Transfer Agent,
By

(FORM OF TRANSFER.)

FOR VALUE RECEIVED the undersigned hereby sells, assigns and transfers to

shares in Pepperell Manufacturing Company mentioned in the within certificate.
Dated:
WITNESS:

LOSS, ETC., OF CERTIFICATES.

In case of mutilation, destruction or loss of any certificate hereunder the trustees may issue a new certificate on such terms as they may think fit in substitution for the certificate so mutilated, destroyed or lost.

DURATION OF TRUST.

3. This trust unless sooner terminated as herein provided shall continue for a term of twenty (20) years next after the death of the last survivor of the following named persons: William Appleton Coolidge and John Linzee Coolidge, children of T. Jefferson Coolidge, Junior, late of Manchester, Mass., deceased; Robert Winthrop, Frederic Winthrop, Jr., and John Winthrop, children of Frederic Winthrop, of Hamilton, Mass.; Barbara Welch and Francis Clarke Welch, Second, children of E. Sohier Welch, of Weston, Mass.; William Dexter, son of Philip Dexter, of Boston, Mass.; Mary Stockton and Charles H. Stockton, children of Philip Stockton, of Manchester, Mass.; Theresa De Normandie and Elsie De Normandie, children of Philip Y. De Normandie, of Milton, Mass.

PURPOSES AND POWERS OF TRUSTEES.

4. The trustees shall employ and use the trust property and assets in the carrying on of the business of manufacturing textile or other fabrics and the component parts thereof from cotton or other materials and buying, selling and dealing in and with the same. The trustees shall have, without other or fur-

ther authorization, full and absolute power, control and authority over the trust property held by them at any time hereunder and over the business of the trust to the same extent as if the trustees were the sole owners of such property and business in their own right, subject only to the limitations herein expressly stated and to the superior control of the shareholders. Without restricting the generality of the foregoing such powers shall include among others the following:

(*a*) To carry on the business aforesaid; to own or operate under letters patent and trade marks; to buy, own, sell, lease or develop real and personal property and water power; to buy, own, sell, lease, erect or operate mills, dams, power plants and other structures; to produce power by steam, water, electricity or other agency and to utilize and sell the same but not thereby or otherwise to engage in any business as a public service company except so far as may be from time to time permitted by law; to do any and all things necessary or proper to effect or which may be incidental to any or all of the foregoing, and either as incidental thereto, or otherwise, to purchase, own, vote upon and dispose of the stock of corporations or associations, including shares issued hereunder, bonds and other securities and to collect dividends or interest thereon.

(*b*) To establish and carry on the business abovementioned or any similar businesses at any other place or places, whether in the State of Maine or elsewhere and either directly or through any controlled corporation or association; to construct and equip or to purchase or otherwise acquire, plants for such businesses with all proper appurtenances thereto and the same to sell, mortgage or otherwise dispose of; and to contract generally with any controlled corporation or association.

(*c*) To employ such agents as the trustees shall think proper in their discretion for the management of the trust property and assets and the management and carrying on of any business herein authorized and to act through such agents to the extent they deem wise.

(*d*) To pay all taxes, assessments and any and all necessary and proper expenses in connection with the man-

agement of the trust property and assets, or the carrying on of the business of the Company, including the purchase of any forms of insurance the trustees may deem advisable.

(*e*) To adopt and use a common seal.

(*f*) To collect, sue for, receive and receipt for all sums of money at any time coming due to the Company; to employ counsel; to begin and prosecute or to defend any actions or suits at law, in equity or otherwise, and to compromise or adjust any such actions or suits or any controversy or dispute or any claim, demand or thing relating to the Company's property or business, or to refer to arbitration any of the foregoing.

(*g*) To borrow money for any purpose herein authorized; to give notes, or to enter into obligations or contracts of suretyship or guaranty, and to secure such notes or obligations by a mortgage or pledge of any personal property of the Company, but such notes or contracts of suretyship or guaranty shall not be valid unless countersigned by at least one of the trustees, in addition to the duly authorized signature thereto on behalf of the Company; to loan money and to invest any funds of the Company as they may deem wise.

(*h*) To cause to be organized a corporation or corporations under the laws of any jurisdiction, or any other trust or trusts, to take over the trust property or any part or parts thereof, and to sell, convey and transfer such trust property or such part or parts to such corporation or corporations, trust or trusts, in exchange for the shares or securities thereof, or otherwise.

EXEMPTION OF SHAREHOLDERS.

The holders of the shares are hereby declared to be *cestuis que trust* and not partners, and nothing herein contained shall constitute the trustees or the shareholders or any of them partners with one another or with any person, firm, association or corporation, or shall render them or any of them personally liable for any debt, contract or obligation or liability entered into or incurred in respect of this trust or by the trustees or

officers or any of them; and neither the trustees nor the officers of this trust shall have any power to bind shareholders personally by any contract, express or implied (either in the names of the trustees or in the name of the trust), or by any act, neglect or default, and in every contract which they make, of whatever nature, whether in the name of the trustees or in the name of the trust, reference shall be made to this Declaration of Trust, and any corporation, person or persons contracting with, extending credit to or having any claim against the trustees or the trust shall look only to the funds and property of the trust for the performance of such contract or for the payment of any debt, mortgage, judgment or decree, or of any money that may become due or payable under the authority or by reason of the failure or neglect of any trustees or any officers of the trust, and neither the trustees nor any present or future shareholders shall ever be personally liable therefor.

EXEMPTION OF PURCHASERS, ETC.

5. No purchaser or mortgagee of any property from the trustees nor any lender to them shall in any event be bound to see to or be affected by the application of such purchase money or money lent. The receipts of any two of the trustees, or the Treasurer of the Company, or either of them, for moneys or things paid or delivered for the trust shall be effectual discharges therefrom to the persons paying or delivering the same.

TITLE TO TRUST PROPERTY AND INTEREST OF SHAREHOLDER.

6. The title to the trust property of every name and nature, and the right, power and authority to carry on and conduct the business of the trust shall be vested solely in the trustees. No shareholder shall be deemed to have any legal title to any of

the trust property or assets, but the interest of the shareholders shall be deemed to be equitable only and they shall have no right to call for any partition or division of any of the trust property or any profits, rights or interests therein during the continuance of the trust. The death of a shareholder during the continuance of the trust shall not operate to determine the trust nor shall it entitle the legal representatives of such shareholder to an accounting or to take any action in the courts or otherwise against the trustees or the property held hereunder, but the legal representatives of such shareholder shall succeed to all his rights under this trust, and upon the surrender of the certificate or certificates of such shareholder the trustees may issue a new certificate or certificates for such shares to the executor or administrator of such shareholder and so doing shall be without liability.

RECORD OF SHAREHOLDERS CONCLUSIVE.

7. The name or names in which any of the shares issued or to be issued hereunder shall be recorded on the books of the trustees shall be deemed conclusive evidence of ownership and the trustees may pay any and all dividends upon such shares to such record holders. And said trustees shall not be under any obligation to take notice or to inquire as to the rights of any assignee or pledgee in the absence of any transfer of record to such assignee or pledgee; and all payments made in accordance herewith shall be deemed duly made and the trustee discharged with respect thereto.

Any and all notices to which shareholders hereunder may be entitled, and any communications of or in respect to any matter or thing hereunder, shall be deemed duly served if mailed, postage prepaid, addressed to shareholders of record

at their last known residences or places of business as recorded on the books of the trustees.

TRUSTEES' NAMES, TERM OF OFFICE, ETC.

8. The trustees shall always be seven (7) in number. The trustees herein named as such shall hold office until the next annual meeting of the shareholders. The term of office of the trustees shall be one year and shall expire at the next annual meeting following their election, subject, however, to the provisions for holding over, as hereinafter set out.

FISCAL PERIODS.

The fiscal year of the trustees shall be divided into two periods, ending respectively June 30 and December 31 in each year.

ANNUAL MEETINGS OF SHAREHOLDERS.

All meetings of the shareholders of the trust shall be held at such place in the State of Maine as shall be from time to time designated by the trustees and specified in the notice of the meeting. The annual meetings of the shareholders of the trust shall be held on the third Thursday of October in each year, at which meeting, or at any adjournment thereof, the said shareholders shall elect seven (7) trustees to serve for the ensuing year.

SPECIAL MEETINGS OF SHAREHOLDERS.

Special meetings of the shareholders of the trust may be called by the President at any time and shall be called upon written request of the holders of five (5) per cent in amount of the outstanding shares, and at special meetings no business shall

be transacted except such as shall have been specified in the notice therefor.

In case by oversight or for any other reason the annual meeting hereinbefore provided for shall be omitted the acts herein provided to be done at such annual meeting may be done at a subsequent special meeting in lieu thereof duly called as in this section provided.

NOTICE OF MEETINGS.

9. Written notice of all meetings, whether annual or special, shall be given by the President or Secretary ten (10) days at least before such meeting. Notice of any meeting may be waived by any shareholder either before or after such meeting.

PROXIES AND VOTING.

10. At any meeting the shareholders may vote by proxy. Only shareholders of record shall be entitled to vote, and each share shall be entitled to one vote. If the holder of any share hereunder is a minor, or for other reason subject to guardianship or legal control, he may vote by guardian or by such other person as may be lawfully authorized thereto and such vote may be given in person or by proxy.

QUORUM.

11. At any meeting of the shareholders, the shares present shall constitute a quorum, and a majority may decide upon all matters coming before the meeting except as herein otherwise expressly provided.

TRUSTEES' MEETINGS, ETC.

12. Regular meetings of the trustees shall be held at such

times and places as said trustees may provide and special meetings shall be held at any time upon the call of the President or any four of the trustees. Notice of any meeting may be waived by any trustee either before or after such meeting. A majority of the trustees shall constitute a quorum and except as herein otherwise provided, any action taken relating either to matters of discretion or otherwise at any meeting duly held, at which a quorum is present, shall be effective as the act of all the trustees; provided, however, that in case of any action relating to the borrowing or loaning of money, the establishment of new plants by purchase or otherwise, or the establishment of any new branch of business, the concurrence of at least four trustees shall be required.

OFFICERS.

13. The trustees shall annually elect from among their number a president; and they shall also annually elect a secretary and treasurer, either of whom may, but need not, be a trustee (which latter two offices may, but need not, be held by the same person); and they shall have authority in their discretion to appoint further vice-presidents, assistant secretaries, assistant treasurers and such other officers and agents as they may from time to time deem advisable and to confer upon all such officers and agents such duties and obligations as they may determine. They may also appoint from among their number an executive committee of three or more persons to whom they may delegate such of the powers herein conferred upon the trustees as they may deem expedient except as herein otherwise provided. They may accept resignations of any officer elected or appointed by them and may fill such vacancies for the unexpired term. They may likewise accept the resignations of

any of their own number and may fill any vacancies thus caused or otherwise existing in their number until the next annual meeting of the shareholders.

COMPENSATION.

14. The trustees shall fix the compensation, if any, of all officers and agents appointed by them and may also pay to themselves such compensation for their own services as they may deem reasonable.

BY-LAWS, ETC.

15. The trustees may make, adopt, amend or repeal such by-laws, rules and regulations not inconsistent with the terms of this instrument as they may deem necessary or desirable for the conduct of the business of the trust, and for the government of themselves and their officers, agents, servants and representatives.

STRANGERS MAY RELY ON TRUSTEES' RESOLUTION AS TO POWERS.

16. So far as strangers to this trust are concerned, a resolution of the trustees authorizing a particular act to be done shall be conclusive evidence in favor of such strangers that such act is within the powers of the trustees.

LIABILITY OF TRUSTEES.

17. The trustees shall each be liable only for his own acts and not one for another, and where they act by agents or servants they shall not be liable for the faults of such agents or servants provided they have used due care in the selection of

them. No trustee at any time acting under this instrument shall be liable for errors of judgment either in holding property originally conveyed to them or in acquiring or afterwards holding additional property, or in selling or disposing of any of the trust property, or in the conduct of the business of the trust, nor for any loss arising out of the conduct of said business; nor for any loss or depreciation in value of any of the trust property, original or subsequently acquired, unless such loss or depreciation shall have been directly caused by his own gross negligence or dishonesty, nor for any loss arising out of any investment, nor for any act or omission to act in the execution of this trust in the absence of bad faith. The trustees and each of them shall be entitled to indemnity from the trust property for any personal liability which may be incurred in the administration of said trust or in the conduct of its business, except such as may arise from wilful default. No bond or other security and no surety or sureties shall ever be required of any trustees acting hereunder, in their capacity as trustees. Any trustee may purchase or acquire shares in this Trust in all respects as if he were not a trustee.

DIVIDENDS.

18. The trustees may from time to time declare and pay dividends out of the net profits received by them, or out of any surplus, but the amount of such dividends and the times of declaration and payment thereof shall be wholly in the discretion of the trustees, as shall also the determination of what constitutes such net profits or surplus. The trustees may also determine what constitutes depreciation and may set apart such depreciation and reserve funds as they may think proper.

TRUST PROPERTY TO VEST IN SUCCEEDING TRUSTEES.

19. Upon resignation, decease, removal or vacancy for any cause in any office of trustee hereunder, the title of the trust property and assets shall vest in the remaining trustees and upon the filling of any vacancy the said title shall vest in the new trustees jointly with the old. Any outgoing trustee or the legal representatives of any trustee deceased shall, at the request of the remaining trustees, but at the expense of the trust, execute, acknowledge and deliver all such conveyances and instruments as may be necessary or desirable to vest the title of said trust property and assets in such remaining or succeeding trustees.

The trustees for the time being, whether surviving, remaining or substituted, shall be vested with all powers, authorities, rights and discretions, and shall be subject to all duties, obligations, limitations and restrictions given to or imposed upon the trustees hereunder.

ACCEPTANCE OF TRUST BY NEW TRUSTEES.

Upon the election of any trustee by the shareholders or by the remaining trustees, he shall execute an acceptance of this trust, which, together with a certificate of the Secretary or Assistant Secretary or of the Clerk of the trustees as to such election, shall be forthwith filed with the depositaries then having custody of this instrument.

Except in cases of resignation or removal, which may take effect at any time, any trustee hereunder shall hold office until the election and qualification of his successor.

ADDITIONAL SHARES.

20. In addition to the shares at any time issued hereunder the trustees may from time to time, with the consent of a ma-

jority in interest of the shares then outstanding, at a meeting duly called and held, in the call for which specific notice shall have been given thereof, issue and dispose of additional shares, creating the whole or any part of said increased issue preferred shares, all upon such terms and in such manner and, if preferred shares, with such preferences, as the shareholders at such meeting may determine.

AMENDMENT, ALTERATION OR TERMINATION OF TRUST.

21. The shareholders may upon the vote of a majority in interest of the shares outstanding at any annual meeting, or at any special meeting called for the purpose, alter or amend this Agreement in any particular (except with respect to the liability of shareholders set forth in the last paragraph of section 4 and except by extending the term of this Agreement) including, but without restricting the generality of the foregoing, any change in the number of trustees, or may terminate this trust. Any such amendment shall be deemed thereafter a part of this agreement, and a copy thereof certified by the President and Secretary of the Company shall forthwith be filed with the depositaries then having custody of this instrument.

TRUSTEES TO WIND UP UPON TERMINATION OR TO TRANSFER AS DIRECTED BY SHAREHOLDERS.

In case of any such vote of termination, the shareholders may also by like majority in interest of the shares outstanding vote to transfer the property, assets and business of this trust to another trust or trusts, or to a corporation or corporations, or in such other manner as they shall deem wise, all upon such terms as they may by such vote determine; and the trustees shall carry out such transfer in accordance with such vote and

so doing shall be without liability. In case of such vote of termination, in the absence of any vote of the shareholders to transfer said assets and business to any other trust or corporation, or otherwise, or in case of the expiration of this trust by limitation, the trustees shall forthwith proceed to wind up this trust and its affairs and business, and after paying or satisfying all obligations and liabilities of the Company shall divide the property then remaining in their hands or its net proceeds ratably among the shareholders. In such winding up and for purpose of making distribution the trustees may in their discretion from time to time sell the whole or any part of the trust property in such parcels as they may determine, at public auction or private sale, and upon such terms as they deem wise. The powers of the trustees shall in any of the foregoing cases of termination continue after such termination to the extent and for such time as may be reasonably necessary to carry out any transfer directed by the shareholders as aforesaid, or to wind up this trust as aforesaid, but not exceeding the time permitted by law.

22. This instrument is executed in the State of Maine and with reference to the laws of said State; and it is the intent of all parties hereto that the construction and effect of this instrument and every part thereof shall be governed by, subject to and construed according to the laws of said State.

23. The trustees shall have power at any time to change the depositaries of this instrument.

IN WITNESS WHEREOF the said trustees above-named have hereunto set their hands and seals the day and year first above written.

JAMES LONGLEY [SEAL]
CHARLES P. BOWDITCH [SEAL]
FRANCIS C. WELCH [SEAL]

GEORGE WIGGLESWORTH [SEAL]
PHILIP DEXTER [SEAL]
PHILIP Y. DE NORMANDIE [SEAL]
WILLIAM AMORY [SEAL]

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss: Boston, March 16, 1915.

Then personally appeared the above-named James Longley, Charles P. Bowditch, Francis C. Welch, George Wigglesworth, Philip Dexter, Philip Y. De Normandie, and severally acknowledged the foregoing instrument by them executed to be their free act and deed, before me.

JAMES P. ROBERTS,
[NOTARIAL SEAL] *Notary Public.*

STATE OF MAINE

YORK, ss: BIDDEFORD, Mar. 19, 1915.

Then personally appeared the above-named William Amory and acknowledged the foregoing instrument by him executed to be his free act and deed, before me.

THOMAS B. WALKER,
[NOTARIAL SEAL] *Notary Public.*

THE MARTIN-COPELAND COMPANY.

This company was held to be a trust and not a partnership by the Supreme Court of Rhode Island, July 6, 1916. Reported in 39 R. I. 193, 98 Atl. 273. The Trust Agreement is as follows:

"An agreement and declaration of trust made the eighth (8th) day of August, A. D. 1912, by and between Edgar W. Martin, of Barrington, in the county of Bristol, and William A. Copeland and Lawrence C. Martin, both of Providence, in the county of Providence, all in the state of Rhode Island, and George W. Bleecker, of Chicago, in the county of Cook, and state of Illinois, trustees of the Martin-Copeland Company, for the purpose of enabling the holders of trust shares hereunder to distribute the advantages and risks of their investments over different securities and business enterprises in a way ordinarily possible to investors, and to that end to hold as a common or joint investment for the common and equal benefit of the shareholders, ratably, according to their several holdings of shares, the personal property, transferred or conveyed to, vested in, or acquired by the trustees under this agreement, and to invest and reinvest such money and funds as may be paid to the trustees or be realized by them from the disposition of shares issued hereunder, in such manner and in such business enterprises, securities, and personal property as under the terms of this instrument shall be permissible, and in the judgment of the trustees exercised under the powers given them by this instrument shall tend to enhance the value of the shares issued hereunder as investments; and the said trustees hereby declare that they will hold all property acquired by them at any time as trustees hereunder, with the proceeds thereof, in trust, to manage and

dispose of the same, and to collect, receive, and distribute the income and profits thereof, for the benefit of the holders from time to time of the certificates of shares or evidences of interest issued and outstanding hereunder, in the manner and subject to the provisions of this agreement.

"Title and Location of Trust.

"(1) The trustees of these presents may be collectively designated as 'Martin-Copeland Company,' and the title of trustee or trustees hereunder shall be 'Trustee of the Martin-Copeland Company,' or 'Trustees of the Martin-Copeland Company,' as the case may be, and their principal place of business shall be at Providence aforesaid.

"(2) The trustees under this agreement are the said Edgar W. Martin, William A. Copeland, Lawrence C. Martin, and George W. Bleecker; but the term 'the trustees,' whenever hereinafter used, shall mean the trustee or trustees hereunder for the time being, whether original or substituted; and any property at any time conveyed, transferred, or assigned to the trustee or trustees hereunder, or otherwise acquired by them, shall be held by them as trustees under this agreement.

"(3) The term 'shareholder,' used in this agreement, shall mean holder of record of the share receipt or share certificate from the trustees hereunder.

"Issue of Shares.

"(4) The trustees under this agreement shall as such have power to issue preferred shares and common shares of the par value of one hundred ($100) dollars each.

"The trustees may issue preferred shares in an amount which shall not exceed in aggregate two hundred thousand ($200,000) dollars par value, and sell the same at public or private sale, or exchange for other shares, securities, con-

tracts, services, or personal property upon such terms and for such prices and considerations as they may deem expedient.

"The trustees may issue common shares in an amount which shall not exceed in aggregate two hundred thousand ($200,000) Dollars par value, and sell the same at public or private sale or exchange for other shares, securities, contracts, services, or personal property upon such terms and for such prices and considerations as they may deem expedient.

"Any trustee may acquire, hold, and dispose of shares in the trust in his individual name and on his personal account, or jointly with others, or as a member of a firm, without being disqualified to act as trustee, and while so owning and holding such shares on his personal account shall be entitled to the same rights and privileges as any other shareholder.

"(5) The trustees shall issue preferred and common share certificates in such form as they shall deem best for each sum of one hundred ($100) dollars or for its equivalent paid to them under this agreement. No share certificate shall be issued for any fraction of a share.

"Transfer of Shares.

"(6) Every transfer of any share (otherwise than by operation of law) shall be in writing under the hand of the transferror, and upon delivery thereof, with the existing certificate for such share, to the trustees, or their transfer agent, shall be recorded in the trust books, and a new certificate therefor shall be given to the transferee, which new certificate and the holder thereof shall thereupon become subject to this agreement. In case of a transfer of only a part of the shares mentioned in any certificate, a new certificate for the residue thereof shall be given to the transferror. Until the existing certificate shall be so delivered and transfer recorded, the

transferror shall be deemed to be the holder of the share or shares comprised therein for all the purposes of the trust thereof, and the trustees shall not be affected by any notice of the transfer.

"In case of the loss or destruction of a share certificate issued hereunder as aforesaid, another may be issued in its place by the trustee, under such conditions as they may deem expedient.

"(7) Any person becoming entitled to any share in consequence of the death, bankruptcy, or insolvency of any shareholder, or in any other way than by a transfer in accordance with the preceding paragraph, shall be recorded in the trust books as the holder of the said share, and receive a new certificate for the same, upon production of the proper evidence thereof and delivery of the existing certificate to the trustees, or their transfer agent, which new certificate and the holder thereof shall thereupon become subject to this agreement. Until such evidence shall be produced, and the existing certificate shall be delivered to the trustees, they shall not be affected by any notice of the change in title.

"Title of Shares.

"(8) All shares shall give only the rights in this agreement and in certificate thereof specifically set forth, and a shareholder, or upon the death, bankruptcy, or insolvency of any shareholder, the person or persons succeeding to his interest as legal representatives, assignees, or otherwise, shall have no right to call for any accounting or division of property or profits.

"General Powers and Duties of Trustees.

"(9) The trustees under this agreement shall have the sole legal title to all property, in any part of the United States of America, or in any foreign country, at any time held,

acquired, or received by them as trustees under the terms of this agreement, or in which the shareholders under this agreement shall have any beneficial interest as such shareholders, and they shall have and exercise the exclusive management and control of the same, in any manner that they shall deem for the best interests of the shareholders, with all the rights and powers of absolute owners thereof. They may sell, exchange, mortgage, pledge, or in any other way dispose of or deal with the property of the trust, or any part thereof, or interest therein, upon such terms as they see fit, and take in payment or exchange therefor cash, securities, property, or notes, and obligations of any kind or description; may adopt and use a common seal; may manufacture, buy, sell, and otherwise deal in precious stones, chains, jewelry, lenses, optical goods and kindred articles, machinery, materials, and articles of all kinds which shall be capable of being used for such purposes, and may purchase or otherwise acquire patents, patent rights and privileges, trade-marks and trade-names, and improved or secret processes, that are in any way related to any of the objects aforesaid, and grant licenses for the use of, or of selling or otherwise dealing in, any patent rights and privileges, trade-marks and trade-names, and improved or secret processes acquired by them, and for these purposes use any moneys and property in their hands; and generally make all contracts and do all things which they may think desirable in the management, development, and maintenance of the trust properties, and shall deem for the best interests of the shareholders. They may sell, discount, or otherwise negotiate notes, commercial paper, and obligations of all kinds coming into their hands, and otherwise, either without security, or secured by the pledge or mortgage with power of sale of the assets of the trust, as they deem best, such sums from time

to time as they require, and they shall have full power to execute all contracts, mortgages, and agreements or instruments in writing, and to do any other things which they shall think proper for executing any of the powers or trusts herein contained, subject only to the provisions and purposes of this agreement, and shall have full power to perform and fulfill all agreements and obligations and pay all liabilities properly assumed by them as such trustees.

"(10) The trustees may make, adopt, amend, or repeal such by-laws, rules, and regulations not inconsistent with the terms of this agreement as they may deem necessary or desirable for the conduct of their business, and for the government of themselves and their agents, servants, and representatives.

"(11) The trustees shall have power to represent the shareholders in all suits or legal procedings in any court of law or equity, or before any other body or tribunal, to employ counsel and commence suits or proceedings or defend the same, and to compromise or submit to arbitration all matters of dispute in which the trust or trustees may be a party, whenever and in such manner as they in their judgment may deem proper.

"(12) The trustees shall have power to invest and reinvest all funds and moneys of the trust in their hands, in merchandise, in stocks and bonds, any other securities and personal property, and at any time to sell, transfer, and dispose of, without further authority or consent than herein contained, any property acquired by them, at their discretion, and upon such terms and for such prices and considerations as they deem wise, and reinvest the proceeds of such sales, upon such terms and conditions as they may deem expedient.

"(13) The trustees shall have power to pay the expenses

of organization of this trust, including all legal expenses in connection with the preparation and carrying out of plan for the formation of the trust and the acquisition of property acquired hereunder; to indemnify themselves or any of them out of the property of the trust for all liabilities for which they or any of them may be personally liable in the carrying out of the trusts herein contained; to pay the necessary and proper expenses of the carrying on of the business of and management of the trust hereunder, and to employ such officers, experts, counsel, managers, salesmen, agents, mechanics, workmen, clerks, bookkepers, accountants, or other persons as they think best, and fix their compensation and define their duties, and any trustee so employed may receive compensation therefor.

"(14) The trustees shall have power to determine whether moneys or things shall, for the purpose of these presents, be considered as capital or income, and what constitutes gross income and what net income in any year, or part of a year, and to determine the mode in which any expenses or outgoings shall be borne as between capital and income.

"Number, Absence, and Incapacity of Trustees, and Vacancies.

"(15) The trustees shall not be more than four in number. The trustees may designate one of their number to act as president and one to act as treasurer, and may change such designations, which officers shall have the authority and shall perform the duties usually incident to these offices in case of corporations so far as practicable, shall have authority to sign share certificates issued hereunder, and shall have such other authority and perform such other duties as may from time to time be determined by the trustees.

"A majority of the trustees constitutes a quorum, and the concurrence of all the trustees shall not be necessary to the

validity of any action done by them, but the wish of a majority of the trustees present and voting at any meeting shall be conclusive.

"Any vacancy in the number of trustees, caused otherwise than by the removal of any trustee or trustees by the common shareholders, may be filled by the remaining trustee or trustees, by an instrument in writing, and in case of the removal of a trustee by the common shareholders, as provided in the following paragraph of this agreement, the vacancy shall be filled only by the common shareholders.

"(16) The common shareholders may, by vote of the majority of shares then outstanding, at a meeting duly called for that purpose, as provided in paragraph 21 hereof, remove any trustee and appoint a new trustee in his stead.

"(17) The trustee or trustees for the time being shall have all the powers of the original trustees.

"(18) In case of any vacancy in the office of trustees, or the incapacity or neglect or refusal to execute the duties reposed in him of any trustee for any reason, or the absence from this country of any trustee for a period of thirty (30) days or more, the remaining or other trustee or trustees shall have and exercise the powers and be subject and holden to perform all the duties of all the trustees so long as such vacancy or absence continues, or such incapacity, neglect, or refusal exists, and the certificate of any remaining trustee shall be conclusive evidence of such vacancy, absence, neglect, incapacity, or refusal.

"(19) Upon the resignation, decease, removal, or permanent incapacity of any trustee or trustees hereunder, or vacancy for any cause in the office of trustee, the title of such trustee or trustees shall vest in the other or remaining trustee or trustees without any conveyance whatsoever; and upon

the filling of any vacancy, or the appointment of any new or additional trustee or trustees hereunder by the common shareholders, or otherwise, as is hereinbefore provided, the title of the trust property shall at once vest in the then trustees for the time being without any conveyance whatsoever.

"(20) The trustees may by vote or otherwise delegate to any one or more of the trustees any of their powers herein, and any trustee may by written power of attorney delegate his power to any other trustee or trustees herein.

"Meetings of Shareholders.

"(21) The trustees may call meetings of common shareholders at any time, and shall do so upon the written request, stating the purpose for which such meeting shall be called, of holders of twenty-five per cent of all the common shares outstanding, and in case of the incapacity, neglect, or refusal of the trustees to call such meeting within a reasonable time after the receipt of such request therefor, the meeting may be called by the common shareholders signing said request, who may do all things necessary therefor required in the following paragraph, or otherwise.

"(22) A written or printed notice of every meeting of common shareholders, stating the time and place of the meeting, and the purposes thereof, shall be given to each common shareholder by the trustees at least seven (7) days before a meeting, by leaving such notice with him or by mailing it, post paid, to the address last given by him to the trustees, or, in case he had given no address to the trustees, to his last known place of business or abode.

"(23) Notices of meetings, or calls for payments or subscriptions, or notices or calls for any other purpose, shall be deemed binding upon each shareholder, if made as provided in the preceding paragraph.

"(24) Common shareholders may vote by proxy, and for the purpose of voting at meetings each common share shall be entitled to one vote.

"(25) No business shall be transacted at any meeting of the common shareholders, unless notice of such business has been given in the call for the meeting, and no business, except to adjourn, either generally or to a time assigned, shall be transacted at any meeting of the common shareholders, unless the holders of forty (40) per cent. of all the shares outstanding are present in person or by proxy.

"(26) A certificate signed by one or more of the trustees, or if the office be vacant, or the trustee or trustees for the time being be unable, neglect, or refuse to act, by the holders of twenty-five per cent. of all the common shares outstanding, shall be conclusive evidence of the regularity of any meeting, of any vote passed, or other proceedings at such meeting, and of all facts in relation to such meeting stated in such vote or certificate.

"Compensation.

"(27) The trustees shall fix the compensation, if any, of all officers and agents whom they may appoint, and are likewise authorized to pay to themselves such compensation for their services as trustees as they may deem reasonable, and any trustee may be employed by the trustees to perform any special business, financial, or other service, and shall in such case be entitled to receive such additional compensation as the trustees may fix and determine.

"Liability of Shareholders and Trustees.

"(28) Shareholders hereunder shall not be liable for any assessment, and the trustees shall have no power to bind the shareholders personally.

"(29) Every act done, power exercised, or obligation as-

sumed by the trustees, pursuant to the provisions of this agreement, or in carrying out the trusts herein contained, shall be held to be done, exercised, or assumed, as the case may be, by them as trustees, and not as individuals, and every person or corporation contracting with the trustees, as well as every beneficiary hereunder, shall look only to the fund and property of the trust for payment under such contract, or for the payment of any debt, mortgage, judgment, or decree, or the payment of any money that may otherwise become due or payable on account of the trusts herein provided for, and any other obligation arising under this agreement in whole or in part; and neither the trustees nor the shareholders, present or future, shall be personally liable therefor.

"(30) No bond or surety or sureties shall be required of any trustee acting hereunder, and each trustee shall be liable only for his own acts, and then only for willful breach of trust.

"Liability for Application of Money Paid to Trustees.

"(31) No purchaser, mortgagee, lender, lessee, or other person shall be bound to see to the application of any money paid by him to the trustees.

"Dividends.

"(32) The trustee may from time to time declare and pay to the preferred and common shareholders dividends out of the net earnings from time to time received by them, but the amount of such dividends and the payment of them shall be wholly in the discretion of the trustees, except that any dividend which may be declared on the preferred shares shall be at the rate of six per cent. per annum and no more, and the same shall be paid and set apart before any dividend shall be paid or set apart for the common shares.

"Reserve or Surplus Fund.

"(33) The trustees shall have authority to reserve in each year such sum as they deem wise from the gross or net income actually collected, as a reserve or surplus fund, with power to use said fund by the trustees at any time for the maintenance of dividends, for the payment of the charges of the trustees, or to treat the same or any part thereof as surplus capital, and to change their determination as to said fund, or any part thereof, from time to time, as to them may seem prudent and expedient, absolutely at their own discretion, but always subject to the terms of this agreement.

"Inspection of Books.

"(34) The transfer books of the trust shall be open to the inspection of shareholders at all reasonable times.

"Amendment of Agreement.

"(35) This agreement and declaration may be amended or altered, except as regards the liability of the trustees and shareholders and the provisions relating to the preferred shares, with the consent of the trustees for the time being, provided any such proposed amendment or alteration shall be authorized and approved at a meeting of the common shareholders by at least two-thirds of all the common shares outstanding, and notice of the proposed amendment or alteration shall have been given in the call for the meeting, but no alteration or amendment shall affect any person not having notice thereof, nor shall any alteration or amendment, or other action, affect previously acquired rights of any third person other than shareholders hereunder.

"Acknowledgment of Certificates.

"(36) Any certificate or paper signed by the trustees, or any of them, or by the common shareholders hereunder, or a copy of the record of any of the proceedings of the trustees

or shareholders, which it may be deemed advisable to record in any registry of deeds, or elsewhere, may be acknowledged by any one of the parties signing in the manner at the time prescribed by law for the acknowledgment of deeds to be recorded in such registry.

"Termination of Trust.

"(37) The trusts under this agreement may be terminated at any time by vote of two-thirds of the common shareholders hereunder at a meeting duly called for that purpose, as hereinbefore provided in paragraphs 21 and 26 of this agreement.

"(38) Unless the trust under this agreement shall be sooner terminated, as hereinbefore provided, they shall continue for twenty-one (21) years after the death of the last surviving original trustee hereto, and of Wesley C. Martin and E. Cornell Martin, sons of the aforesaid Edgar W. Martin trustee hereof, and at the expiration of the time so limited for such continuance of the said trusts they shall terminate.

"(39) Upon the termination of the trusts under this agreement by the expiration of time, or for any other cause, the trustee shall sell the trust property at either public or private sale and liquidate its assets; the proceeds of the liquidation shall be first applied to the payment of the holders of preferred shares of the sum of one hundred dollars per share and any accrued and unpaid dividends thereon, and the balance remaining thereafter shall be divided among the holders of common shares in proportion to their holdings.

"Acceptance of Trustees.

"(40) Edgar, W. Martin, William A. Copeland, Lawrence C. Martin, and George W. Bleecker aforesaid, herein named as trustees, hereby signify their acceptance of the trusts herein set forth.

"In witness whereof the said trustees have hereunto set their hands and seals on the day and year first above written.

"Witnesses:

"Edgar W. Martin. (Seal.)

"Russell W. Wright.

"William A. Copeland. (Seal.)

"Russell W. Wright.

"Lawrence C. Martin.

"Russell W. Wright.

"George W. Bleecker."

TRUST OF MATHILDE PIETSCH, FOR HER BENEFIT.

The court said, in the case of Pietsch v. Marshall & Ilsley Bank, Wisconsin—160 N. W. 184: A trust instrument whereby the trustor gave her realty and personalty to trustees to manage for her benefit during her life, and then to distribute in accordance with the instrument, was not a testamentary disposition of her property; the effective parts of the instrument clearly and expressly constituting a valid trust, and all other phraseology being readily harmonized with that intent and object. Following is a copy of the trust instrument:

"Whereas, Mathilde Pietsch, of sound mind and memory, is aged and is desirous of keeping her property intact until her death, and wishes to be relieved from the cares and responsibilities connected therewith, and also is desirous of making disposal thereof upon her death, for the purpose of carrying out her intentions, said Mathilde Pietsch hereby sells, assigns, sets over, grants, and conveys to her daughter Doretta Pietsch, and to her son Ferdinand Pietsch, and to the survivor of them all her property, real and personal, in trust nevertheless upon the express trusts following, and hereby revoking all former disposals of a testamentary character, or otherwise; and the said Doretta Pietsch and Ferdinand Pietsch hereby accept such property upon the trusts as herein expressed:

"(1) Power and authority is hereby given to the trustees or to the survivor of them to gather in, collect, sue for all rents, insurance, mortgages, interest, and other property of every kind and nature of the said Mathilde Pietsch and convert all into money and to invest and reinvest same in securities as said trustees shall deem meet and proper.

"(2) For and during her natural life said Mathilde Pietsch is to receive the use and income of said property the net in-

come of which is to be paid over to said Mathilde Pietsch upon her request and at such times as she may desire.

"(3) On the 1st day of January and July of each year trustees shall render an accounting of their stewardship to said Mathilde Pietsch.

"(4) There is also assigned to said trustees upon the trusts herein expressed life insurance policy No. 73430, dated July 22, 1867, in the Connecticut Mutual Life Insurance Company of Hartford, Conn., for twenty-two hundred dollars ($2,200.00), subject to a note against it held by said company, and there is also assigned to said trustees all moneys which said Mathilde Pietsch may have in banks.

"(5) Said Mathilde Pietsch has this day also delivered in escrow, to be held by Frederick M. Wilmanns until her death, and then to be delivered to her trustees, a deed of all her real estate (description of real estate omitted), subject to the lawful incumbrance thereon, and in which said deed the trustees are the grantees, and which said real estate the trustees, after the death of said Mathilde Pietsch, are to sell and dispose of at such price, and upon such terms and conditions as they may deem just and proper, and distribute the proceeds according to the trust herein provided for.

"(6) Out of the personal property or the proceeds thereof coming to the hands of said trustees, and all other personal property which said Mathilde Pietsch may have an interest in at the time of her death, said trustees are ordered and directed to pay as soon as may be convenient, after payment of said Mathilde Pietsch's just debts and funeral expenses, as follows:

"(7) All the rest, residue, and remainder of my estate I order and direct my said trustees, or the survivor of them, to distribute same in equal shares among my six children, Doretta Pietsch, Ferdinand Pietsch, Mathilde Mayer, nee Pietsch, Lena

Plats, nee Pietsch, Albert Pietsch and Hugo Pietsch, or their heirs. For the purpose of converting my property into money and to make distribution as aforesaid, I authorize and empower my trustees to take whatever steps they may deem necessary to accomplish the purpose; it being distinctly understood that no distribution is to be made until after my death. Should any question arise in the execution of the trust, power and discretion is given to my trustees, and to the survivor of them to act as they think best, confident that my trustees will act for the best interest of all concerned.

"In witness whereof the said Mathilde Pietsch has hereunto set her hand and seal this 31st day of July, 1915, and the said Doretta Pietsch and Ferdinand Pietsch have also hereunto set their hands and seals on the same day, and accept the trusts as created and declared herein.

"Mathilde Pietsch. (Seal.)
"Doretta Pietsch. (Seal.)
"Ferdinand Pietsch. (Seal.)"

The foregoing instrument was witnessed and also acknowledged by Mathilde Pietsch, Doretta Pietsch, and Ferdinand Pietsch before a notary.

HARRY HAULMAN TRUST DEED AND WILL.

In the case of Haulman v. Haulman, 164 Ia. 471; 145 N. W. 930, the will and trust agreement were construed. Following is a copy of both instruments:

These presents witness that I, Harry Haulman, a resident of Ankeny, in the county of Polk and state of Iowa, do by these presents create a trust of my entire property, and do place the same therein subject to the following conditions and limitations, to wit:

On the 1st day of November, A. D. 1907, I will place in the hands of my two sons, H. E. Haulman and B. T. Haulman, the sum of twenty-five hundred dollars ($2,500.00), whom I do hereby create the trustees of said fund, and also of any and all other sums that may be added to said sum both before and after my decease.

Said sum of twenty-five hundred dollars ($2,500.00) is hereby placed in trust with my said sons, H. E. Haulman and B. T. Haulman, for the use and benefit of my five children, to wit, H. E. Haulman, B. T. Haulman, Mrs. J. H. Harris, Mrs. W. H. Lewis, and Mrs. A. W. Wagner, each to share equally in the fund and benefits thereof as hereinafter provided.

Said sum of $2,500.00 is to be invested in such securities as my said trustees shall both agree upon and deem wise and best by them, and they are to add to said fund all interest accumulations and profits accruing from said $2,500.00 so invested, and to keep said fund, its accumulations and profits, continuously invested in such ways as they shall deem best.

My said trustees shall pay to me 4 per cent. interest on said original sum of $2,500.00 on the 1st day of November in each year beginning with November 1, A. D. 1908. But, in case I do not need or desire my said trustees to pay me said interest,

then the same shall be kept intact in said trust fund. My said trustees shall not be required to pay interest on any accumulations or profits, but only on the original sum of $2,500.00.

With the written consent of all of my said children who may be living at any particular time, my said trustees may loan any portion of said trust fund to any one of my said children on such terms and securities as to my said trustees shall seem wise and best.

In case, also, of real necessity, and upon the written consent of all of my said children who may be living at any particular time, my said trustees may permit any one of my said children to draw from said trust fund any amount which my said trustees shall think to be best, up to the amount of such child's undivided share in said fund, but no more. In case of the death of one or more of my said children, his children or living issue of his body shall have and receive his parent's share of said fund, and the benefits thereof, the same as my said child so deceased would have received his share of said fund, and the benefits and profits thereof.

In case any of my said children shall die leaving no children or living issue of his body, then, and in that event, the portion of said trust fund and its accumulations which would have gone to my said child shall remain in said trust fund, and shall be divided equally among my said other children, or their issue, the same as the balance of the fund shall be handled, and not otherwise.

Upon my death, all of my property, both real and personal, and wherever situated, shall pass into the hands of my said trustees to be handled by them as said $2,500.00, and the whole of said property shall be kept intact by my said trustees in such form and condition as to them shall seem best for the full period of five years from the date of my decease, when, at that

time, my said trustees shall make an equal distribution of said trust property, and of all of my property then remaining, to my said five children, or the living issue of their body, share and share alike. That is, each child shall receive a portion equal in all respects to that of any other of my said children. And if any of my said children be then dead, and have issue of their body then living, such issue shall receive the portion of said trust fund and property which would have gone to their parent had he or she been living.

In the case of the death of either or both of my said trustees, the remaining children of mine herein mentioned shall choose a successor to such deceased trustee who shall carry on and perform the trust herein created. It being my desire and intent that no person outside of my own children as herein mentioned shall ever be a trustee of this trust. It being my desire, also, and intention that there shall at all times be two trustees of my said property.

Should I, at any time, add to this trust amount in my lifetime, my said trustees shall receive such amounts, and handle and care for such amounts, the same as is herein mentioned concerning said $2,500.00 and its accumulations and other property.

It is my desire, and a condition that I require of my said trustees, that they keep a strict account of said trust fund, and of all additions thereto, and of all accumulations thereof, and that each year, in the month of November, they render a written statement to me, and to each of my said children, showing the actual condition of said fund, the amount thereof, and how invested, and the securities held by them. It is also my desire and intention that my said trustees shall serve without compensation other than that arising to all of my children equally.

Witness my hand this 5th day of December, A. D. 1907.

At the same time that this instrument above set out was executed, the said Harry Haulman made his will, as follows:

I, Harry Haulman, being of lawful age and of sound mind and disposing memory do hereby make, publish and declare this to be my last will and testament, to wit: I do hereby will, bequeath and devise unto my five children, H. E. Haulman, B. T. Haulman, Mrs. J. H. Harris, Mrs. W. H. Lewis, and Mrs. A. W. Wagner, all of my property both real and personal that I now have, or may hereafter accumulate or acquire, share and share alike.

I do hereby nominate and appoint my two sons, H. E. Haulman and B. T. Haulman executors of this my last will and testament and request and direct that they keep and care for my property the same as I have this day directed them to do in an article of trust and that they follow out the provisions of said trust fully, and, at the end of five years from my decease that they make an equal distribution of my property to my said children. If any of my said children die without issue and in that event, his share shall be equally divided among the remaining children, except that if any of my children are deceased and have living issue, then and in that event, they shall receive the share which their parent would have received if living.

I do hereby request that said trust be fully executed and that said trust instrument and this will be construed together and that my said property be handled and disposed of as in said trust instrument and in this will provided. Witness my hand this 5th day of December, A. D. 1907.

JOHN PLANKINTON; DECLARATION OF TRUST IN FORM OF WILL.

The trustees were undecided as to what action should be taken in reference to certain clauses in the instrument. They went to the court for instruction. This case is reported in 152 Wis. 275; 140 N. W. 5, as Upham v. Plankinton. Copy of the Trust Instrument is as follows:

I, John Plankinton, of the City of Milwaukee, in the State of Wisconsin, do make, publish and declare this my last will and testament and I do hereby revoke and annul any and all other wills by me at any time heretofore made.

I do hereby nominate and appoint my wife, Annie B. Plankinton and my son, William Plankinton, to be the executrix and executor of this my will, and in case of the death of either before my death, I wish the survivor to be such executrix or executor, and I wish that no bond or security of any kind be required of either of them for the faithful discharge of any duty as such executrix or executor or for the performance of any trust whatever under this will, meaning hereby to direct that such bond and security be waived.

I direct that my just debts, if any there shall be, and necessary and proper funeral expenses and charges and expenses of administration be paid out of my estate.

I give and bequeath to my niece, Julia Hickey, of Sharpsburg, in the State of Pennsylvania, the sum of five thousand dollars ($5,000).

I give and bequeath to my sister, Ann J. Denham, the mother of said Julia Hickey, the sum of twenty five thousand dollars ($25000) and in case of the death of my said sister before my death I direct that the said sum of twenty five thousand dollars be paid to my said niece, Julia Hickey, in addition to the above mentioned sum of five thousand dollars,

making her bequest thirty thousand dollars which I hereby give.

I hereby give, devise and bequeath to my wife, Annie B. Plankinton, to have, hold and enjoy for and during her life, my homestead being a part of block two hundred and fifty five (255) in Roger's Subdivision, now in the 16th Ward of the City of Milwaukee, bounded on the north by Grand Avenue, on the east by Fifteenth Street, on the south by a line twenty feet south of the barn now on the premises parallel with the north line of the block, and west by the east boundary of the land of my son, William Plankinton, and by said line produced south to the south boundary aforesaid, including the dwelling house, barn and all other buildings and improvements upon the premises, and also all animals, articles and property of any kind, owned by me at the time of my death provided for use, or convenience or ornament, in or about our home, whether in the dwelling house or in the barn or any building on the premises or in the grounds outside of any building, to the end that at my death my wife shall take, have, hold and enjoy during her life our home with its appointments and surroundings as the same shall be at the time of my death, and while I make this devise and bequest to my wife for her life subject to no charge or condition whatever, I know that it will be a pleasure to her, as it will accord with my wishes, that while she lives and occupies our homestead it shall continue to be the home of any of my family desiring or needing it.

I make the following bequests to be paid in money with no unnecessary delay after my death, to-wit: ten thousand dollars ($10,000) to the Society, corporation or association which manages and controls the hospital in the City of Milwaukee known as the Passavant Hospital, for the use and

benefit of that hospital; five thousand dollars ($5,000) to the Milwaukee Orphan Asylum, meaning the charity in the City of Milwaukee known as the Protestant Orphan Asylum; five thousand dollars ($5000) to Jeremiah Quinn of the City of Milwaukee and one thousand dollars to each of the following persons who are in my employ at and about my residence, to-wit: Charles Burmeister, Senior, Charles Burmeister, Junior, Adolph Riemer, Ellen Bogne, Sarah Bogne, Kate Delany, Kate Adamer and Elizabeth Dawson.

All the rest, residue and remainder of my estate and of property of every kind and nature, which I shall own or in which I shall have any right, title, interest or claim at the time of my death, I hereby give, devise and bequeath unto the above named executrix and executor of this will, and to the survivor of them, *in trust,* for the uses and purposes hereinafter set forth for a term during the lives of my daughter, Elizabeth E. Plankinton and my son, William Plankinton, and twenty one years thereafter, if they shall both survive me, but in case either should not survive me, then for a term during the life of the one who survives me and of my wife, if she survives me, but in case my wife does not survive me and one only of my said children survives me, then for a term during the life of such surviving son or daughter and in case neither of my said children survives me and my wife survives me, then for a term during her life.

It is my will that during the term of their trust, said trustees have the entire control, management and charge of the estate and property committed to them, both personal and real, collecting receiving and handling all moneys for the interest of the estate, continuing or changing any and all investments which may have been made as they shall deem best, investing and reinvesting or otherwise using any and all

moneys that may come into their hands in such manner and upon such securities as they shall deem best, intending hereby to give to them full authority and discretion and not holding them to any prescribed rules governing the investment of trust funds.

It is my will, that during the term of their trust, said trustees, out of the income derived from my estate in their hands care for, maintain and keep in good repair and condition all buildings and other property as shall be for the best interest of the estate, and that by repairing and replenishing when necessary they maintain and keep up the furniture and all articles and property of any kind whatsoever, in the hotel building in the city of Milwaukee, known as the "Plankinton House" which I shall have provided for use or convenience or adornment so that so long as the building shall remain used and kept as a hotel, it may be, in all respects, first class.

It is my will that said trustees shall set apart each year one tenth of the whole net income of my estate and hold the same and all additions thereto as a fund to meet any extraordinary expenditures or any expenditure for which the income is not sufficient, which they shall deem best for the protection or benefit of the estate. The moneys constituting such fund they shall invest and keep invested as they shall be able, so that the fund may be always available for the purpose intended, such investments to be made in such manner and on such securities as the trustees shall deem best.

The trustees are hereby authorized and the survivor of them is authorized to sell and convey any and all real estate hereby devised to them which shall be vacant and not occupied with buildings at the time of my death on such terms and for such prices as they shall deem best and to invest any or all moneys received from such sales, in the purchase of improved

real estate or in erecting buildings on any vacant land held by them as part of my estate, as they shall deem best.

In case of the damage or destruction by fire or other casualty of any building held by the trustees for which they shall receive insurance moneys, it is my will that the trustees apply such moneys or so much as may be needed to the repair or rebuilding of such building with full authority to make any changes or improvements in so repairing a damaged building or in building again on the site of a destroyed building as the trustees shall deem advisable and if at any time they shall deem it best they are authorized to use the ten per cent reserved fund for such purpose in addition to insurance moneys received.

I hereby direct that said trustees pay to my wife, Annie B. Plankinton out of the net income of my estate held by them, ten thousand dollars annually during her life it being my intention thereby that she have means provided for the payment of taxes, repairs, and other expenses upon the homestead with full authority to use any excess at her pleasure.

I hereby direct that said trustees after paying or providing for the payment of all sums that shall be required each year for taxes, insurance, repairs, and every other purpose required for maintaining and for the charge and care of my estate in their hands, as herein intended, and after setting apart the ten per cent reserved fund each year, and after paying or providing for the payment of the sum of ten thousand dollars yearly to my wife during her life, shall divide the remainder of the net income equally between my wife, my son and my daughter, one third of such net income, each year, to each, during their lives and these payments I wish to have made semi-annually.

In case of the death of either of the three, leaving surviv-

ing no lawful issue, I direct that the share of such net income intended for such deceased one, be thereafter paid to the other two, so long as they shall live (not exceeding the term of the estate of said trustees) one half to each, and upon the death of either of the two, so surviving the third, leaving no lawful issue, I direct that the whole of such net income be paid to such last survivor during her or his life, not exceeding the term of the estate of said trustees.

In case either dying shall leave issue surviving, then I direct said trustees to continue the payment of the share of such income hereby intended for such one deceased to the child or children of such deceased, share and share alike, if there shall be more than one child so long as they shall live and so long as the estate shall be held by the trustees, and in case of the death of any child having lawful issue surviving then to such issue during life, so long as the estate shall be held by said trustees, the issue in all cases taking by right of representation and not per capita.

It is my will that the trust herein created shall cease, and the term for which such trustees hold shall end upon the death of the one who shall last survive of my wife, my son and my daughter, if such death of the last survivor shall occur before the expiration of the twenty one years hereinabove stated for the life of the trust.

All the rest, residue and remainder of my estate and of property of any kind that shall be and remain at the termination of the trust and the end of the term for which it is to be held by said trustees, under the preceding provisions of this will, I hereby give, devise and bequeath to the surviving issue of my son and of my daughter if they shall leave issue surviving one half to the issue of my son and one half to the issue of my daughter such surviving issue taking in all cases

according to the right of representation and not per capita. And in case either my son or daughter should die leaving no issue surviving him or her then the entire rest, residue and remainder aforesaid, I hereby give, devise and bequeath to the issue surviving of either my son or my daughter who has left issue surviving such issue in all cases where it is applicable, taking according to the right of representation and not per capita. All real estate devised by this paragraph of my will is to be taken in fee and all personal property absolutely.

In case there shall be no lawful issue surviving of either my son or my daughter at the termination of the trust herein and at the end of the term for which said trustees are to hold my said estate and property as above provided, and in case there has been no disposition of the property under any subsequent clause of this will, then upon such termination of the trust, I hereby give, devise and bequeath all the rest, residue and remainder of my estate and property held by said trustees unto the Passavant Hospital hereinbefore mentioned, meaning thereby to the society, association or corporation having the charge and control of the Hospital in Milwaukee known by that name, for the use and benefit of that hospital, all real estate devised hereby to be taken in fee and all personal property absolutely with full power to the devisee to convert, dispose of or use at pleasure for the benefit of the hospital.

The provisions contained in this will for my wife are intended to be in lieu of her dower and any other lawful interest in my estate as my widow, and if accepted are to be so taken.

In case my son and daughter shall survive my wife and my daughter shall reach the age of fifty five years and at

that time there shall be no issue living of either my son or my daughter, it is my will that the trust herein created shall terminate and the term for which said trustees hold my estate end, although before the period herein first fixed for the termination of such trust, and in such case I hereby give, devise and bequeath all the rest, residue and remainder of my estate and of my property of any kind then in the hands of said trustees, in equal shares or parts to my son William Plankinton and my daughter, Elizabeth E. Plankinton to be by them respectively held, the real estate in fee and the personal property absolutely.

In case of the death of my daughter before she reaches the age of fifty five years, leaving no issue surviving her, then upon the death of my wife, if she survives my daughter, and if my wife does not survive my daughter then upon the death of my daughter, if my son William survives and has no issue living at that time, it is my will that the trust herein created shall thereupon cease and the term for which said trustees hold shall then end, although it be before the end of the twenty one years hereinabove named for the termination of the trust and all the rest, residue and remainder of my estate and property held by the trustees, in such case, I give, devise and bequeath to my son William Plankinton and to his heirs and assigns forever.

In case of the death of my wife and of my son William before my daughter reaches the age of fifty five years then if there is no living issue of either my son or my daughter, it is my will that the trust herein created shall thereupon cease and that the term for which said trustees hold shall then end although it be before the end of the twenty one years hereinabove named and provided for the termination of such trust and in that case, all the rest, residue and remainder of my

estate and property in the hands of said trustees, I hereby give, devise and bequeath unto my daughter Elizabeth E. Plankinton and her heirs and assigns forever.

IN TESTIMONY WHEREOF I have hereunto set my hand and seal and published and declared this instrument of 13 written pages to be my last will and testament in the presence of the witnesses named below this 15th day of February, A. D. 1889.

John Plankinton (Seal)

The above instrument of 13 written pages signed, sealed, published and declared by said John Plankinton as and for his last will and testament in presence of us, who in his presence and in the presence of each other and at his request have hereto subscribed our names as witnesses.

Jerome R. Brigham Milwaukee, Wis.
E. E. Murphy Milwaukee, Wis.

PENNYROYAL DEVELOPMENT COMPANY.

THIS AGREEMENT, made this 4th day of June, A. D. 1921, between William F. Ware, designated as the Subscriber, and Edmond J. Ware, Joseph K. Ryan, Russell Hogan and George E. Garth, and William F. Ware, together with their successors, herein designated as the Trustees, witnesseth:

THAT WHEREAS, the Subscriber and Lessee proposes to transfer, assign and deliver to the Trustees, under the designation of the PENNYROYAL DEVELOPMENT COMPANY, certain leases which are more fully described in Schedule A hereto attached and identified by the signatures of the parties hereto, and filed with the Trustees; and the Trustees, for the purpose of defining the interest of the Subscriber and his assigns in such property, have agreed to issue to the Subscriber, negotiable certificates representing Beneficial Interests, or shares, in and to the Trust Estate herein created, to the amount of Twelve Hundred and Fifty (1250) Common Beneficial Interest or shares, each Interest to be of the expressed par value of One Hundred Dollars ($100.00), the same being fully paid and non-assessable, and are transferable on the books of the Trustees in accordance with the terms of this instrument.

NOW, THEREFORE, the Trustees, for and in consideration of the said leases, hereby transferred, assigned and delivered to them by the Subscriber, described in Schedule A, have agreed and do hereby agree to issue to the Subscriber Beneficial Certificates to the amount of Twelve Hundred and Fifty (1250) Common Beneficial Interest or shares, and the Trustees hereby further declare that they will hold the remaining of the Twenty-five Hundred (2500) Common Beneficial Interest and said property, to be transferred to them as well as all other property which they may acquire as Trustees, together with the

proceeds and profits thereof, in trust; to manage and dispose of the same for the benefit of the holders from time to time, of certificates issued hereunder, and in the manner and subject to the stipulations herein contained, to wit:

FIRST: That whenever the term "Trustees" is used herein, it shall refer to and include the above Trustees, and also any successors in trust, appointed under the terms hereof. That whenever the term "Company" is used herein, it shall be deemed to refer to said PENNYROYAL DEVELOPMENT COMPANY, being the designation, so far as practicable, of the said Board of Trustees and their successors in trust, in their collective capacity, under the terms hereof. That wherever the term beneficiary is used herein it shall be deemed to mean the owner of a Beneficial Interest in and to the trust estate herein. That whenever the term "Certificate Holder" is used herein it shall be deemed to mean the owner of a certificate evidencing one or more Beneficial Interests, of the par value of One Hundred Dollars ($100.00) each, in and to the Trust Estate herein mentioned the legal title, ownership and control of which estate is vested in said Trustee; and that whenever the term "Certificate is used herein, it shall be deemed to mean an instrument in writing, or printed or partly written and printed, issued by said Trustees, evidencing the ownership of an equitable interest in said estate of one or more beneficial interests, as may therein be stated.

(B) The Trustees, in their collective capacity, shall be designated, so far as practicable, as the PENNYROYAL DEVELOPMENT COMPANY, and under that name shall, so far as practicable, conduct all business and execute all instruments in writing, in performance of their trust.

SECOND: The Trustees do hereby acknowledge the receipt by them of the property aforementioned, and it is express-

ly agreed that the said property, as well as any other which may hereafter be acquired by the Trustees for the purpose herein mentioned under the terms hereof, shall be received by the Trustees, and shall be by them held, owned, controlled, managed, and applied to the uses and purposes herein mentioned, and to no other.

(B) That the money, or property, together with the income and issues thereof received or acquired by the said Trustees under the terms hereof, shall constitute and be held, kept and used by them as a Trust Estate for the use and benefit of the Certificate Holders in the said estate, and that the said Trustees are authorized, empowered and directed to apply the said money or property or the proceeds, the increase or income thereof, constituting said Trust Estate, as follows, to wit:

(C) To buy and sell leases; to buy and sell land; to develop and drill for oil and gas; to buy and sell oil and gas; to construct, buy, sell, own and operate pipe lines, tank lines, cars, ships, trucks, and any and all other appliances for the handling and selling of oil and gas.

(D) To enter into, apply for, purchase or otherwise acquire any franchises, contracts or concessions for or in relation to the construction, execution, carrying out, equipment, improvement, administration, management or control of the aforementioned operations or of works and conveniences, and to undertake, execute, carry out, sublet, dispose of or otherwise do any and all things necessary to put into effect the purposes for which the said trust is organized.

(E) To construct, manufacture, buy, sell, install, lease or otherwise dispose of and deal in and trade in works, machinery, appliances, instruments, vehicles, supplies, materials and articles of every nature and description used or capable of being used in the production, refining, manufacture, operation, dis-

tribution, control or other appliances used in the production, refining and transporting of gas and oil.

(F) To acquire the good will, rights and other oil and gas property, or other properties, whether owned by individuals, corporations, trusts or associations, or otherwise, and to undertake the whole or any part of the assets or liabilities of any person, firm, association, corporation or trust; to pay for the same in cash, the Beneficial Interests of this Trust Estate, bonds or otherwise, as the Trustees deem fit; to hold or in any manner dispose of or conduct in any lawful manner, the whole or any part of the business or property so acquired, and to exercise all the powers necessary or convenient in and about the conduct and management of such business.

(G) To enter into, make and perform contracts of every kind with any person, firm, association or corporation, persons, municipality, body politic, county, State, government, colony or dependency thereof and without limit as to amount, to draw, make, accept, endorse, discount, execute and issue promissory notes, drafts, bills of exchange, warrants, bonds, debentures, and other negotiable and transferable instruments and evidences of indebtedness whether secured by mortgage or otherwise, so far as may be permitted by the laws of the State of Kentucky or of the United States.

(H) To do any or all of the things herein set forth to the same extent as natural persons might or could do, and in any part of the world, as principals, agents, contractors, trustees, or otherwise, and either alone or in company with others.

To have offices, conduct its business and promote its objects within and without the State of Kentucky, in other States, the District of Columbia, the territories and colonies of the United States, and in foreign countries, without restriction as to place or amount.

In general, to carry on any other business in connection therewith, whether manufacturing, agricultural, mining or otherwise, not forbidden by the laws of the United States.

THIRD: The Trustees hereunder shall be five in number, but at any annual meeting, or regular or special meeting of the Trustees, called for that purpose, the Board of Trustees may be increased to seven or nine members by the then Board of Trustees, and the Trust Estate shall rest in the additional Trustees, in connection with those already in office, the same as if they were original parties to this instrument; and the Trustees herein mentioned shall hold their office until the annual meeting, or until their successors have been elected and have accepted their trust.

(B) The Trustees, shall, at every annual meeting or adjournment thereof, elect a full Board of Trustees to serve for the next ensuing year, said annual meeting to be on the first Tuesday in June, following the first Monday in June each year, commencing in 1922.

FOURTH: The Trustees are authorized to employ all necessary or proper agents, servants, brokers, attorneys, employees or counsel, to carry into effect the purpose of the trust herein contained, and to protect and preserve the same, and to provide and pay out of said trust estate the compensation, fees, commissions, or expenses incurred in the management thereof, and to vote salaries to themselves. To contract for and on behalf of said trust estate, and to bind the same and its property to the performance of such contracts; to borrow money on behalf of such trust estate on such terms and conditions as said Trustees shall deem best, and to bind said estate and its assets to the payment of such indebtedness and to pledge and incumber any property of said estate, whether real, personal or mixed, for the security of the indebtedness so incurred, under such terms and

conditions as to the Trustees may seem best, and to agree upon, approve and fix, execute and deliver in the name and on behalf of the said trust estate, any deed, pledge, mortgage, bond, note endorsement or guarantee, trust deed, or any other instrument which may be necessary or proper to carry out the terms of this instrument. But neither the said Trustees nor the said certificate holders nor any of them shall be in any manner personally liable by virtue of any contract, note, bond, deed of trust, mortgage or other instrument executed under the terms of this paragraph, but the same shall fully bind the property of the said trust estate for the performance thereof.

(B) The said Trustees are hereby authorized to do, or cause to be done in any lawful manner, all the things which are incidental, necessary or proper to carry fully into effect all of the purposes herein enumerated or powers hereby conferred, the general authority given being intended to control and make fully effective the power and authority of the Trustees under this instrument, notwithstanding the specific enumeration and description thereof herein.

(C) It is expressly understood that all expense incurred by said Trustees in carrying out the terms hereof, as well as all liabilities incurred by them in the execution of said trust, whether arising from contract or tort, shall be considered as expenses of executing said trust, which shall first be paid out of the assets and properties thereof, and which shall be a first and prior lien against the said estate and property, superior to all others.

(D) The said Trustees shall, in their own name, as Trustees of said estate, bring any suit or action which in their judgment shall be necessary or proper to protect said estate or to enforce any contract made for the benefit thereof, and to defend in their discretion any suit or action against said estate

In general, to carry on any other business in connection therewith, whether manufacturing, agricultural, mining or otherwise, not forbidden by the laws of the United States.

THIRD: The Trustees hereunder shall be five in number, but at any annual meeting, or regular or special meeting of the Trustees, called for that purpose, the Board of Trustees may be increased to seven or nine members by the then Board of Trustees, and the Trust Estate shall rest in the additional Trustees, in connection with those already in office, the same as if they were original parties to this instrument; and the Trustees herein mentioned shall hold their office until the annual meeting, or until their successors have been elected and have accepted their trust.

(B) The Trustees, shall, at every annual meeting or adjournment thereof, elect a full Board of Trustees to serve for the next ensuing year, said annual meeting to be on the first Tuesday in June, following the first Monday in June each year, commencing in 1922.

FOURTH: The Trustees are authorized to employ all necessary or proper agents, servants, brokers, attorneys, employees or counsel, to carry into effect the purpose of the trust herein contained, and to protect and preserve the same, and to provide and pay out of said trust estate the compensation, fees, commissions, or expenses incurred in the management thereof, and to vote salaries to themselves. To contract for and on behalf of said trust estate, and to bind the same and its property to the performance of such contracts; to borrow money on behalf of such trust estate on such terms and conditions as said Trustees shall deem best, and to bind said estate and its assets to the payment of such indebtedness and to pledge and incumber any property of said estate, whether real, personal or mixed, for the security of the indebtedness so incurred, under such terms and

conditions as to the Trustees may seem best, and to agree upon, approve and fix, execute and deliver in the name and on behalf of the said trust estate, any deed, pledge, mortgage, bond, note endorsement or guarantee, trust deed, or any other instrument which may be necessary or proper to carry out the terms of this instrument. But neither the said Trustees nor the said certificate holders nor any of them shall be in any manner personally liable by virtue of any contract, note, bond, deed of trust, mortgage or other instrument executed under the terms of this paragraph, but the same shall fully bind the property of the said trust estate for the performance thereof.

(B) The said Trustees are hereby authorized to do, or cause to be done in any lawful manner, all the things which are incidental, necessary or proper to carry fully into effect all of the purposes herein enumerated or powers hereby conferred, the general authority given being intended to control and make fully effective the power and authority of the Trustees under this instrument, notwithstanding the specific enumeration and description thereof herein.

(C) It is expressly understood that all expense incurred by said Trustees in carrying out the terms hereof, as well as all liabilities incurred by them in the execution of said trust, whether arising from contract or tort, shall be considered as expenses of executing said trust, which shall first be paid out of the assets and properties thereof, and which shall be a first and prior lien against the said estate and property, superior to all others.

(D) The said Trustees shall, in their own name, as Trustees of said estate, bring any suit or action which in their judgment shall be necessary or proper to protect said estate or to enforce any contract made for the benefit thereof, and to defend in their discretion any suit or action against said estate

or against the Trustees thereof. The said Trustees are expressly authorized to bring or defend such suit in their discretion or to compromise and settle any suit, claim or controversy in which the said estate is interested, as to them may seem best, and to discharge the same out of said estate and its assets; and they are specially authorized to pay or transfer out of said estate and its assets, all sums of money or property necessary to discharge any judgment against them in their said capacity as Trustees, together with all court costs, or other costs, including counsel and attorney's fees and also to pay out of said estate or its assets, such sums of money, or transfer or appropriate property thereof, for the purpose of settling, compromising, or adjusting any such claim or controversy, together with any such costs and expenses connected therewith, and all of such expenditures shall be treated as expenses of executing this trust.

(E) The Trustees shall have full power to invest and reinvest the trust estate, its profits, income, increase, surplus or avails, subject to the terms of this instrument. But the trustees shall not delegate to any agent or attorney in fact, the power to contract on behalf of said estate, or bind it to the payment of money, but when said trustees have agreed upon the terms and forms of any contract or contracts, or other instrument or instruments necessary or proper for the carrying out of the purposes herein mentioned, and the execution of the trust hereby created, they may, by resolution or other written authority, designating and describing the form of such contract or contracts or instrument, authorize an agent or agents, attorney or attorneys in fact, to countersign and deliver, in the name and on behalf of said Trustees, any such contract or instrument, but in no case shall such agents or attorneys be authorized to countersign or deliver any notes, bonds, bill of

sale, mortgages, trust deeds, encumbrances, or pledges transferring, binding, encumbering or alienating the property of said trust estate, whether real, personal or mixed.

(F) The Trustees shall hold the legal title to all property at any time belonging to their trust and shall have and exercise the exclusive management and control of the same, and the right of the said Trustees to manage, control and administer the said trust estate shall be absolute and unconditional, free from the control or management of the certificate holders.

(G) So far as strangers to this trust are concerned, a resolution of the Trustees authorizing a particular act to be done shall be conclusive evidence in favor of such strangers that such act is within the powers of said Trustees, and no purchaser from the Trustees or one loaning money to the Trustees shall be bound to see to the application of the purchase money or loaned money or other consideration paid or delivered by or for said purchaser or loaner to or for said Trustees.

FIFTH: Stated meetings of the Trustees shall be held at least once every three months, and other meetings shall be held from time to time, upon the call of any officer or Trustee. A majority of the Board of Trustees shall constitute a quorum, and the concurrence of all the Trustees shall not be necessary to the validity of any action done by them, but the wish of the majority of the Trustees present and voting at any meeting shall be conclusive, except as hereinafter provided; they may adopt and use a common seal; they may make, adopt, amend or repeal such by-laws, rules, and regulations, not inconsistent with the terms of this instrument, as they may deem necessary for the conduct of their business or for the government of themselves, their agents or representatives.

SIXTH: The Trustees may elect officers, who shall have the authority and perform such duties as the Trustees may de-

termine. They may combine the duties of several officers in one person. Two of such officers, elected, at least, shall be from among their own members. The Trustees shall have authority to elect or appoint temporary officers to serve during the absence or disability of regular officers; to fix the compensation of any or all officers, agents or employees they may appoint, and are likewise authorized to pay themselves such compensation for their services as they may deem reasonable.

(B) The Trustees shall cause to be kept by a Secretary elected by them, a record of all meetings of the beneficiaries and of the Trustees, which record shall be similar in character and of the effect as that kept in case of corporations, and so far as strangers to this trust are concerned, shall be conclusive against the Trustees of the facts and doings therein stated.

(C) Any Trustee may acquire, own and dispose of beneficial interests in this trust to the same extent as if he were not a Trustee hereof.

(D) Any Trustee may be removed for just cause. The term "Just Cause" as used in this paragraph, shall mean any cause which is detrimental to the interest of the trust estate other than political, racial or religious. Any Trustee may file charges for just cause with the Board of Trustees against any member thereof, and the remaining members of said Board of Trustees shall constitute a commission with the exclusive power and authority to investigate and determine said charges.

(E) In case of removal of any Trustee, a statement of the cause therefor shall be set forth in writing, which statement shall be in duplicate, and shall be signed by the members of the Commission. The copy of said statement shall be delivered personally to the Trustee so to be removed and the other copy of said statement shall be filed in the office of the Trustees with a notation thereon showing proof of service of a copy of said

statement upon the said Trustee. Upon filing of a copy of said statement, in the office of the Trustees, the removal shall immediately become effective.

(F) Whenever a Trustee who has been so removed, shall file with the Commission, within five days after his removal, a statement in writing alleging his removal was made for political, racial, religious causes, or for unjust cause, and that he believes that upon a hearing he will be able to establish such fact, it shall be the duty of the Commission to order a hearing. The time and place of such hearing shall be fixed by the Commission and due notice thereof given to said Trustee. Upon such hearing, the Commission shall determine and decide whether or not the removal was made for political, racial, religious causes, or for unjust cause, and if the Commission finds in favor of the Trustee, then he shall be elected to serve the balance of his term.

(G) In case of death, resignation or removal of any Trustee, the remaining members of the Board of Trustees shall have the power and authority to elect Trustees to fill the unexpired term or vacancy thus created, and for that purpose, a majority of the remaining Trustees shall be sufficient to elect one or more Trustees as above stated, and such Trustees, as above elected, shall occupy the same relation to this Trust as if they were original parties to this instrument. In case of death, resignation or disqualification of the entire Board of Trustees, a new Board may be appointed for the unexpired term by a Court of Equity of competent jurisdiction.

(H) Neither the said certificate holders or any of them, or their property shall be liable for any indebtedness or liability created by, growing out of, or arising from the execution of the said trust estate, whether arising from contract or tort of the said Trustees, their servants, agents or employees, in the

administration of said estate. The Trustees, personally, nor either of them, nor their private property, whether real, personal or mixed, shall be in any manner, liable for any debt or liability incurred by said Trustees, or any of them, in the administration or management of the said estate, whether arising from contract or tort of the said Trustees or any of them, or their agents, servants, or employees; and neither said Trustees or either of them shall ever be held personally liable for any damage or injury to person or property caused by or arising from, incident to, or growing out of the execution of said trust; nor shall they be liable for the acts or omissions of each other. That the assets of the said trust estate only, shall be liable for any indebtedness, liability, wrong, injury or tort incurred, arising out of or growing out of, the administration of the said trust estate by the said Trustees or any of them or for any act or negligence or default of their servants, agents, or employees in the administration of said estate.

(I) The said Trustees shall use ordinary and reasonable diligence in the performance of this trust, but shall not be liable to the certificate holders or any of them, for any act, default, failure or negligence in or connected with the execution of the said trust, provided, the same shall not amount to and constitute fraud, embezzlement or wilful breach of trust, and they shall not be obliged to give bond to secure the due performance of this trust by them.

SEVENTH: That for the purpose of evidencing the respective and proportionate equitable interests of the said certificate holders in and to the said trust estate, the said Trustees are hereby authorized and directed to execute and deliver to each such beneficiary hereunder, a certificate signed by the officers designated for that purpose, which shall evidence and set forth how many interests of the par value of One Hundred

Dollars ($100.00) each, the said beneficiary therein named is entitled to as a beneficiary of said trust estate.

(B) The said trust estate shall be divided into Twenty-five Hundred (2500) Common Beneficial Interests, all of which Interests shall be of the expressed par value of One Hundred Dollars ($100.00) each, and the certificates issued by the Trustees to said beneficiaries shall be substantially in the following form, to wit:

PENNYROYAL DEVELOPMENT COMPANY

Number..... .....Shares

This certifies that.....is the holder of .....shares in the capital of the PENNYROYAL DEVELOPMENT COMPANY, fully paid and non-assessable, subject to Declaration of Trust in favor of said organization, dated June 4th, 1921, and recorded in Todd County, Kentucky, and transferable only on the books of this organization, in person or by attorney, upon surrender of this certificate properly endorsed.

IN WITNESS WHEREOF, the said organization has caused this certificate to be signed by its duly authorized officers, and its seal to be hereunto affixed this.....day of ....., A. D. 1921.

.....

Secretary.

.....

President.

Shares $100.00 each.

(C) By a unanimous vote of all the Trustees at any annual meeting, or special meeting called for that purpose, the Trustees shall have the power, after the Twelve Hundred and Fifty (1250) Common Beneficial shares now remaining in the treasury have been sold and used for the interest and advancement of the Trust Estate herein created, to issue preferred beneficial interests of said Trust Estate, to such an amount from time to time as they shall deem expedient for the interest and advancement of the Trust Estate herein created, and such pre-

ferred beneficial interests may be sold for cash, exchanged for property, or distributed as dividends, at the option of the trustees.

(D) In case of the loss or destruction of any certificate of beneficial interests issued hereunder, by the Trustees, the Trustees may, under such terms as they may deem expedient, issue new certificates in place of the ones lost or destroyed.

(E) The Trustees may from time to time declare and pay such dividends as are earned by all outstanding beneficial interests, out of the net earnings from time to time received by them, as they may deem advisable; but the amount of such dividends and the payment of them, shall be wholly in the discretion of the Trustees, and the surplus profits or earnings shall not be maintained as separate fund, but shall be merged into the body of the trust property.

(F) Beneficial interests hereunder shall be transferable only on the books of the Trustees upon surrender of certificates therefor and presentation of a written transfer thereof. The acceptance of a certificate of beneficial interests by the original holder or transferee shall make the person named in said transfer of certificate a party of this instrument as if such party had, in person, joined in the execution thereof.

(G) The name in which a certificate of beneficial interests stands on the books of the Trustees, shall be considered by the Trustees conclusive evidence of ownership, and they shall not be required upon transferring such certificate, or paying dividends on such interests, or distributing assets upon the termination of the trust, or at any other time, to inquire in any way into the relations between assignor and assigns, pledgor or pledgee, trustee and beneficiary, guardian and ward, or in any other similar relation, and shall have the right to conclusively presume without inquiry, that the holder of any such certificate

as shown by their books is the real and true and unconditional owner thereof.

EIGHTH: Annual meetings for the election of Trustees and for the transaction of other business shall be on the first Tuesday in June, following the first Monday in June, each year, commencing in 1922, of which meeting the secretary or acting secretary, shall give notice by mail to each Trustee at his registered address at least ten days before such meeting, but failure to give notice of such meeting shall not invalidate the proceedings of the meeting.

(B) The Trustees may call the certificate holders together at the annual meeting of said Trustees, upon ten days' notice given as aforesaid, at which meeting the Trustees may submit an annual, or such other reports as they may deem advisable, to said certificate holders for their information, and the certificate holders, at such annual meeting, may nominate from among themselves, candidates for the office of Trustees, presenting such nominations to the Board of Trustees, but the election of such nominees, by the Trustees, shall be wholly optional with said Trustees. The fiscal year shall end each year on December 31st.

NINTH: The death of a beneficiary or of a Trustee during the continuance of this trust shall not operate to terminate the trust, nor shall it entitle the legal representative of the deceased certificate holder to an accounting, or to take any action in the courts, or elsewhere, against the Trustees; but the executors, administrators or assigns of any deceased certificate holder shall succeed to the rights of said decedent under this trust, upon surrender for transfer, of the certificates for the interests held by him.

(B) It is expressly agreed that the said trust shall not be terminated or the administration thereof in any wise interfered

with or suspended by the death of any such beneficiary, or his incapacity for any reason, or by his said interest or interests being by process of law subjected to the payment of debts, or in any way vested in any heir, assign, creditor, or purchaser, of the said beneficiary, or in any trustee, assignee or officer of any court, or by the same in any manner being divested out of the beneficiary and transferred or vested in any other person, administrator, executor, trustee, assignee, or personal representative. But any such person who may, in any such manner acquire or become vested with the ownership of such certificate, shall thereupon succeed to and become entitled to all the rights and equities of the beneficiary therein named, and the beneficial interests in the said trust estate, upon surrendering the original certificate to the said Trustees with such proof of ownership as may be reasonably required by them, and the issue in lieu thereof of a new certificate, and notwithstanding said change of ownership or interest in any such certificate, or death or insolvency of the original owner thereof, the said trust estate shall continue and remain in full force until terminated as herein provided.

(C) The ownership of interests hereunder shall not entitle the certificate holder to any title in or to the trust property whatsoever, or right to call for a partition or division of the same, or for an accounting, or for any voice or control whatsoever of the trust property or of the management of said property or business connected therewith by the Trustees.

TENTH: The Trustees hereunder shall, in entering into contracts and in the execution of notes, bonds, or other written instruments obligatory upon the said estate, set forth in appropriate terms that the said instruments are not entered into by them nor binding upon them individually, but only as Trustees of this estate, and that contracts or obligations are to be

satisfied or performed out of the assets of said trust estate only. But the failure or neglect of such Trustee or Trustees to so declare in any instrument, contract or obligation entered into for the purpose of carrying out the objects of said trust, shall not be construed to render said Trustees or any of them, individually liable thereon, but the same shall be obligations binding upon and performable only out of the assets of said trust estate.

(B) It is further expressly agreed that the said Trustees are fully authorized in their capacity as such and for and on behalf of said trust, to receive, collect, receipt and give full releases, acquittances and discharges for any sums of money which may be payable to them as said Trustees for the benefit of said trust, or for any property or any other thing of value which they may be entitled to receive on behalf of said trust.

ELEVENTH: This trust shall not continue in any event longer than for the term of twenty-one years after the death of the Subscriber, at which time the then Board of Trustees shall proceed to wind up its affairs, liquidate its assets, and distribute the same among the certificate holders of the beneficial interests according to the number of interests held by them.

(B) For the purpose of winding up their affairs and liquidating the assets of the trust, the then Board of Trustees shall continue in office until such duties have been performed.

IN WITNESS WHEREOF, the said Edmond J. Ware, Joseph K. Ryan, Russell Hogan, George E. Garth and William F. Ware, Trustees, hereinbefore mentioned, have set their hands and seals in token of their acceptance of the trust herein specified, for themselves and their successors; and the said William F. Ware, Subscriber, has hereunto set his hand and seal in token of his assent to and approval of said terms of

trust for himself and his assigns, the day and year first above written.

.....Trustee (Seal)
.....Trustee (Seal)
.....Trustee (Seal)
.....Trustee (Seal)
.....Trustee (Seal)
.....Subscriber (Seal)

STATE OF KENTUCKY }
COUNTY OF TODD } ss.

I, a Notary Public in and for said County aforesaid, do hereby certify that Edmond J. Ware, Joseph K. Ryan, Russell Hogan, George E. Garth and William F. Ware, personally known to be the same persons whose names are subscribed to the foregoing instrument, appeared before me this day in person, and acknowledged that they signed, sealed and delivered the said instrument as their free and voluntary act for the uses and purposes therein set forth.

Given under my hand and official seal this day of June, A. D. 1921.

.....
Notary Public.

SCHEDULE A.

I, William F. Ware, Subscriber to the Declaration of Trust herein, hereby transfer, assign and deliver to the Trustees, for the purposes set forth in the Trust, all my right, title and interest which I now have in certain leases. The following is a list of the names of the owners of the fee of the

said leases, number of acres leased, date of lease and date of expiration of leases:

NAME	ACRES	DATE	DUE
Watts Bros.,	640	11–3–19	11–3–21
J. L. Lawson,	380	11–3–19	11–3–21
Mrs. Eula Garth,	208	11–29–19	11–29–21
F. B. Graham,	302	11–7–19	11–7–21
Willie Fox,	123	11–12–19	11–12–21
W. H. Ryals,	175	1–15–20	6–15–21
D. M. Christian,	117	10–30–19	10–30–21
Y. G. Jones,	96	11–3–19	11–3–21
Mrs. M. E. Jackson,	125	11–5–19	11–5–21
H. L. Tutt,	191	11–12–19	11–12–21
Mrs. N. H. Carneal,	205	11–6–19	11–6–21
R. W. Jefferies,	125	11–5–19	11–5–21
C. R. Dickinson,	150	5–13–20	11–13–21
T. D. Smith,	495	11–12–19	11–12–21
Wright Bros.,	247	11–7–19	11–7–21
D. H. Powell,	280	10–31–19	10–31–21
E. H. Dickinson,	220	4–19–20	10–19–21
Tom Duerson,	104	5–15–20	10–15–21
Mrs. Daisy Shelton,	75	5–15–20	10–15–21
F. Rives & J. C. Crews,	149	5–6–20	10–6–21
E. N. Wakefield,	93	4–30–20	9–30–21
J. W. Tyler & J. W. Roberts,	134	6–7–20	6–7–21
Jim Camp,	125	10–30–19	10–30–21
Ashton Waller,	400	11–1–19	11–1–21
H. R. Dickinson,	400	5–13–20	11–13–21
I. M. Jackson,	165	11–6–19	11–6–21
Mrs. Belle Stack,	285	11–7–19	11–7–21
C. M. Waller,	270	5–13–20	11–13–21
Repo Arwin,	300	5–13–20	11–13–21

NAME	ACRES	DATE	DUE
Ed Butler,	225	5-13-20	11-13-21
J. A. Spicer,	188	11-13-19	11-13-21
O. D. Boxley,	521	5-3-20	11-13-21
W. T. Payne,	98	5-6-20	11-5-21
J. E. Byars,	150	5-6-20	11-6-21
O. W. Wilson,	540	5-5-20	11-5-21
George Minims,	300	4-12-20	10-12-21
W. E. Jackson,	327	1-30-20	6-30-21
N. B. Hopson,	407	5-15-20	11-15-21
R. W. Harris,	144	11-10-19	11-10-22
J. C. Young,	105	11-13-19	11-13-21
W. G. Duerson,	335	5-8-20	11-8-21
B. A. Camp,	180	5-7-20	11-7-21
B. F. Mitchell,	150	5-3-20	11-3-21

.....Trustee (Seal)
.....Trustee (Seal)
.....Trustee (Seal)
.....Trustee (Seal)
.....Trustee (Seal)
.....Subscriber (Seal)

THE GREAT AMERICAN HOME SAVINGS INSTITUTION.

Adjudicated in State v. Lee, 233 S. W. 20.

This agreement and declaration of trust for the formation and administration of an unincorporated association to be known and styled as the Great American Home Savings Institution made and executed this 27th day of October, 1920, by and between C. R. Bramblet, G. L. Faulhaber, F. C. Shryock, R. L. Gurney, Samuel Niccols, J. B. Murphy, H. H. Scheer, and such persons who may become additional trustees under the terms hereof, all of whom are hereinafter collectively designated as "trustees".

Witnesseth, Whereas, the parties hereto, and those who may hereafter become associated with them, as herein provided, desire to form a voluntary association for the purpose of availing themselves of the provisions of the laws of Missouri applicable thereto and particularly of the provisions of Section 3431a, R. S. Mo. 1909, as found in the Session Acts of 1919, at page 226, for the purpose of accumulating a fund to be used as herein provided under the terms of said section for the purchase or building of houses, the acquisition of farming lands, or other income property, or paying off mortgage, or other incumbrance, and desire also to provide a fund to be raised by the said trustees for the protection and security of persons contributing as investors or depositors to any fund or funds herein contemplated, and to furnish capital for the administration of all of the business and affairs of said institution, and to provide loans therefrom to the contributors to said funds, and to such ends to publish and declare the terms, conditions, regulations and stipulations on

which all and every such funds herein provided for may be accumulated, held, managed, invested, reinvested, loaned, expended and distributed.

Now, therefore, in consideration of the premises and the terms, stipulations, condition, regulations and provisions hereof, the parties hereto for themselves, their successors in trust and those who may hereafter become trustees, for the use, benefit and protection of all persons who may become the holders or owners of any of the certificates herein provided to be issued, agree and declare as follows:

NAME.

1. The business shall be conducted under and known by the style and name of

Great American Home Savings Institution

and when the said name is signed by any officer or employee, duly authorized by the board of directors, it shall bind the assets or funds of this institution to the extent authorized under the terms hereof and all persons may sue said directors officially or in the name of the Great American Home Savings Institution and any judgment obtained on any such claim shall be paid solely out of the assets of said institution, and all persons having claims against said institution on account of credit extended thereto, are hereby authorized to enforce payment out of any funds belonging to said institution which have not been specifically set aside for the benefit of other classes of persons or claimants. The directors shall have the right and authority by all proper proceedings and in all courts of competent jurisdiction, to sue for and recover all of the assets, and enforce any and all of the rights of the institution.

LIABILITY AND INDEMNITY—NOTICE.

2. No trustee, director or officer of said institution shall be personally liable for any debts properly chargeable against said institution or any fund or funds thereof,

If any such persons shall be compelled to pay out of his or their own proper funds any such claim, such person shall be entitled to indemnity from any funds or assets available for that purpose, with interest thereon from the date of payment at the rate of 6 per cent per annum until paid; provided, any such claim shall not be collectable from the loan and trust fund as hereinafter established, unless the funds so paid out have been expended for the benefit and protection of said fund.

OBJECTS, PURPOSES AND POWERS.

3. The objects and purposes of this association are declared to be, (a) to provide for the accumulation of a fund or funds to be used as herein provided for the purpose of enabling contributors thereto, to purchase or build homes, acquire farming lands or other income property, and pay off mortgages, other incumbrances, or make improvements; (b) to provide for the issue of trust certificates on the partial payment or installment plan; (c) to provide for the issue of full-paid interest-bearing certificates; (d) to provide for the issue of trustees' certificates (e) to provide for and define the rights and limitations of the various classes of certificate owners; (f) to provide for and grant authority to a committee of the trustees as directors to administer the said trust and to fix the rate of interest liability to be assumed on account of any class of certificate issued hereunder, and limit said interest liability thereon, and on the loan and trust fund;

(g) to provide for and fix the purposes, uses and disposition to be made of said loan and trust fund and the regulations for its loan or investment and the accumulations thereon; (h) to provide authority in the directors to make loans from said loan and trust fund to certificate owners contributing to such fund; (i) to provide for the distribution of any surplus profits accruing from the management of the institution; (j) to provide authority in the directors to procure insurance on property in which the institution is in any way interested against loss by fire or from other casualty; (k) to provide authority in the directors to procure indemnity to said institution against loss on account of any property acquired under foreclosure; (l) to provide authority in the directors to make provision for all necessary expenses incurred in the operation or management of the trust herein created; (m) to provide authority in the directors to fix the compensation of trustees, directors, officers, agent and employees for services actually rendered to said institution in any capacity; (n) to provide authority in the trustees or directors to make, alter, repeal and enact by-laws, rules, regulations and resolutions for the government, management, control and disposition of the assets of said institution, its assets, or funds, and its officers, agents, and employees, and therein fix and define any powers of the trustees or directors which may become necessary and proper to be fixed and defined in order to the full exercise of control over said institution, its assets, funds, officers, agents and employees; provided, that no such by-laws, rules, regulations or resolutions shall be valid if in conflict with the constitution or laws of the State of Missouri or the provisions thereof.

TRUST CERTIFICATES.

4. All persons who apply for and are granted participation in the said loan and trust fund, shall become by the acceptance of their application therefor, bound by the several provisions of the certificate issued to them and the terms, stipulations, conditions, regulations and provisions hereof, as fully as though each person had actually accepted a certificate containing this agreement printed or written therein in full;

Certificates issued to all persons applying for the benefits of said loan and trust fund and accepted under the rules of the institution, as contributors thereto, shall be substantially in the following form:

OTHER CERTIFICATES—CHANGES.

5. All other certificates herein contemplated or authorized to be issued, under the terms of this instrument or any amendment thereof, shall be in the form prescribed by the board of directors and the approval of the Supervisor of Building and Loan Associations of the State of Missouri; and on like approval, they may alter the form of trust certificate hereinabove set forth.

BOOKS OF ACCOUNT AND RECORDS.

6. The board of directors shall cause a full and accurate set of books of account to be kept, in which shall be recorded all of the financial transactions of the institution. A full report of the financial condition shall be made by the president of the trust at all annual meetings of the trustees, and at special meetings thereof when included as an object in the call therefor. The secretary or other person designated by the board of directors shall keep accurate minutes of the

proceedings of all trustees' meetings, all board of directors' meetings and all proceedings of committees appointed by the board. The minutes of all proceedings of such committees shall be reported to the board for action thereon.

BOARD OF DIRECTORS—OFFICERS ELECTED BY.

7. The board of directors shall provide by proper by-laws for the election within two weeks after each annual meeting of the trustees of a president, one or more vice-presidents, a treasurer, a secretary and such other officers as it may deem necessary, and define their powers and duties.

The compensation of all officers shall be fixed by the board of directors and of all agents and employes, by the board or such officers as they may designate.

All directors and officers named may be removed by the board on notice and hearing as the by-laws provide; and all other officers, agents and employes at the pleasure of the board or as the by-laws may provide.

8. Trust certificates issued on the partial payment plan shall be in denominations of not less than $1,000.00 nor more than $10,000.00 on one application, but may be issued in the sum of $1,000,00 or any multiple of $100.00 in excess thereof, and providing for a monthly deposit of 65 cents per month per each $100.00 face value for eleven years, and provided, if certificate owner desires more than the maximum of $10,000.00, same may be issued in two or more certificates. Full-paid certificates may be issued in denominations of $50.00 or any multiple thereof for not less than six months, nor more than eleven years, with interest payable annually or semi-annually; provided the interest to be paid thereon shall not be greater in amount in per annum percentage paid than

interest earned on loans made, and said full-paid certificates shall not be issued in greater volume than is necessary to meet and fill immediate loan demands from certificate owners.

LOAN AND TRUST FUND AND OTHER FUNDS.

9. The board of directors shall provide, establish and at all times maintain unimpaired, a "loan and trust fund" and such other funds of a trust character as may be necessary to fulfill the obligations of said Great American Home Savings Institution, under the terms of any class of certificate issued under the authority hereof and said "loan and trust fund" shall be sufficient in amount—when improved with interest at the rate of four (4%) per cent per annum compounded monthly—to equal the accrued value of the certificates issued and in force at all times and sufficient to equal their face value at maturity date thereof, based on interest at the rate of 4% per annum as aforesaid, and said "loan and trust fund" shall be increased to the extent of the surplus earnings, from fines, transfer fees, cash-surrender and partial paid-up certificates. The said "loan and trust fund" shall be for the benefit of certificate owners contributing thereto, and may be used for any of the following purposes; in making loans to certificate owners in the order of their written application therefor, for the purpose of purchasing or building a home, purchase of farm, or other improved income property, or making improvements thereon; or paying off mortgage or other incumbrance and paying certificates their full face value at their maturity date—with their equitable share of surplus earnings not to exceed the maximum named in the certificate; or for paying cash-surrender and partial paid-up certificates.

The first three monthly deposits made on said trust certificates and 30 cents per each $1,000.00 face value thereof, of each subsequent monthly deposit made thereon, shall belong to the general funds of the trust.

After providing for all obligations to certificate owners of all classes as provided for by the terms of their respective certificates, including their equitable share of surplus earnings, all additional earnings, if any, shall belong to the general funds of the trust.

TRUSTEES' ANNUAL AND SPECIAL MEETINGS.

10. The trustees shall meet annually on the first Tuesday of November in each year during the continuance of this trust, beginning in the year of 1922, and at such place and times as they may determine or in default thereof, as the board of directors may designate. The trustees may hold special meetings for the exercise of any of their powers, on the call of the president, when directed by the board in writing or requested by 25 per cent of the trustees owning trustees' certificates entitled to vote at trustees' meetings. The call for every special meeting shall state the time, place and object of the meeting and the authority causing such call to be issued. No business except such as is stated in the call therefor shall be transacted at any special meeting of the trustees, without the unanimous consent of the holders of all issued and outstanding trustees' certificates entitled to vote at such meeting, given in person or by proxy duly authorized in writing.

Notice of all annual and special meetings of the trustees shall be mailed by the secretary to each trustee, postage prepaid to his last known address, as appears by the books of

the trust, at least twenty days before the time set for such meeting; and all of such trustees hereby constitute the United States Post Office as his agent to receive and deliver such notice.

If for any reason, any annual meeting of the trustees shall not be held at the time designated in such notice, it shall be the duty of its president to call such annual meeting within sixty days thereafter, and such meeting when assembled shall possess all the powers of the meeting, had same been held at the time and place herein and in said notice designated.

At all annual and special meetings of the trustees the owners of 25% in par value of the issued and outstanding trustee certificates shall be necessary to constitute a quorum for the transaction of business, but a smaller number may adjourn to a different time or place. All questions to be voted upon at any meeting of said trustees shall be determined by a majority vote of the total number of votes represented thereat in person or by proxy.

AMOUNT OF LOAN MADE.

11. No loan shall be made on any property in excess of fifteen thousand dollars ($15,000.00) nor to exceed seventy-five per cent (75%) of the actual cash value thereof, as determined by the Great American Home Savings Institution, or its duly appointed appraiser, due consideration being given to the income value thereof, provided if the loan and trust fund shall at any time become in amount larger than the demand for loans from certificate owners to borrow, the directors are hereby vested with the power and authority to loan said funds on straight mortgage real estate loans; but to none but certificate owners so long as there is adequate

demand from said certificate owners to borrow on security within the requirements hereof.

TRUSTEE CERTIFICATES.

12. In furtherance of the objects, purposes and powers herein enumerated and in order to raise funds to meet immediate loan demands from certificate owners as contributors to the loan and trust fund, the board of directors shall issue to the trustees signing this instrument and such persons who may desire under its rules to become trustees hereunder, when fully paid for at not less than their par value, trustees' certificates in any aggregate amount, not to exceed, however, $100,000.00 in par value. Said certificate shall be issued only to bona fide trustees who become parties to this declaration of trust by duly signing this instrument or accepting a trustees' certificate and their assigns or legal representative. Said trustees' certificates shall be redeemable only at the expiration of this trust agreement or its termination from any cause; and in consideration of their character, furnishing a revolving fund to be loaned to persons entitled to participate in said loan and trust fund, the owners of said trustees' certificates shall have the exclusive right to vote on all questions to be determined hereunder, at the meetings of the trustees.

The owners of said trustees' certificates shall be entitled to one vote cast in person or by proxy in the form prescribed by the board of directors, per each unit of one hundred ($100.00) dollars of par value on each certificate owned; provided, that in the election of directors the number of votes entitled to be cast may be multiplied by the number of directors to be elected and apportioned among any number less than the whole or cast for one director as such trustee may

desire; and, provided, further, that no person shall be entitled to vote for director unless his certificate or certificates for the units sought to be voted shall have stood on the books of the institution, in the name of the person seeking to so vote in person or by proxy, for at least thirty days before the meeting at which he seeks to so vote is, or should have been, held under the terms hereof.

Dividends may be declared out of the net earnings of the institution by an equal percentage on the par value of all issued and outstanding trustees' certificates; provided, that the payment of said dividend shall in no way impair said loan and trust fund or deprive the holders of trust certificates or the holders of any other class of participation certificates of their equitable proportion or any surplus earnings. The interest required to be accumulated in order to meet the amount due on trust or other certificates shall be set aside before the owners of said trustees' certificates shall be entitled to dividends.

The amount of trustees' certificates may be increased to any sum in excess of one hundred thousand ($100,000.00) dollars by a majority vote of any annual or special meeting of the trustees called, and held as herein provided, and shall be entitled to the right, priority and preferences as determined by the resolution providing for such issue, not inconsistent with the terms hereof.

The proceeds received from subscriptions to any such trustees' certificates, not to exceed their par value per unit, shall be held liable to guarantee all liabilities to certificate owners of all other classes, and the maintenance of the loan and trust fund at all times unimpaired.

LIABILITY OF TRUSTEES.

13. Trustee certificates shall be issued to each trustee evidencing their interests in such form as the directors may provide, and said certificate shall contain a clause that this certificate is full paid and non-assessable, and when the said certificate has been paid for in cash at its par value, the liability of said trustee is hereby limited to the funds invested therein.

COMPENSATION—TRUSTEES, DIRECTORS AND EMPLOYES.

14. The directors of the trustees shall determine and fix all compensation of trustees, officers, agents or other employes, for services rendered in any and all capacities, whether in the form of salaries or commissions, and provide means for the payment thereof; provided said compensation shall in no way be paid out of, or impair the loan and trust fund as herein created.

BOARD OF DIRECTORS.

15. A committee of their own number, to consist of not less than five or more than eleven, as determined by resolution of each meeting if a change in number be desired, to be known as the board of directors, shall be elected by the trustees, at each annual meeting to hold the legal title to all of the assets of the trust for its use and benefit and for the use and benefit of all persons who may be entitled to a beneficial interest therein.

The board of directors shall be vested with the right to exercise all of the powers herein enumerated, and particularly those stated in the third clause hereof headed "Objects —Purposes and Powers."

The board of directors shall be charged with the duty of taking all proper action, by all appropriate methods, in order to have the proper, fair and equitable administration of the affairs and business of the trust. It shall provide for regular and special meetings, and at all times be subject to the control of the trustees in annual or special meetings assembled, and shall comply with all by-laws and resolutions adopted thereby.

The following persons shall constitute the first board of directors, as though duly elected at an annual meeting of the trustees, namely; C. R. Bramblet, G. L. Faulhaber, Samuel Niccolls, F. C. Shryock, J. B. Murphy.

Their terms of office shall expire on the election by the trustees, at their first meeting, and the qualifications of their successors; but in no event shall their terms last beyond the time set herein for the first annual meeting of the trustees.

Vacancies in the membership of the board of directors from any cause may be filled from among the persons eligible, for the unexpired term, by the remaining directors or a majority thereof.

TITLE TO REAL ESTATE AND OTHER PROPERTY.

16. The directors may have, hold, own, manage, dispose of real, personal and mixed property in furtherance of any of the objects and powers of this trust, and if deemed advisable, may direct that a committee of directors or other competent trustees receive and hold the title to any such real estate, but such deed thereto shall recite that the title thereto is held by the grantees for the use and benefits of the Great American Home Savings Institution. Neither said institution nor any person as trustee for its use and benefit shall hold the title to any real estate for its use for a longer period than

twenty years from the date such use begins, and within such period any such real estate shall be sold. It is expressly declared that it is not the intention or purpose of this trust to invest its funds in real estate further than may be necessary for the use of the trustees or directors in conducting its business, or to protect the assets of this institution.

DIRECTORS—NOTICE OF ELECTION—EFFECT.

17. Upon the election and qualifications of a new director or directors, by either the trustees or directors, it shall be the duty of the president and secretary to execute a certificate of the fact and acknowledge same so as to entitle same to be received of record.

The qualification of a successor director shall have the effect of transferring to such successor all of the rights and title of his predecessor.

It shall be the duty of any retiring director to execute any instrument of writing necessary or proper to divest himself of all right or title, as such director, in any and all of the assets of the trust, so as to fully clear the title thereto and vest same in his successor or in the proper holder or holders thereof.

EFFECT.

18. This instrument and any amendment thereof, and any certificate of a fact pertaining to the trust, or any of its assets or funds, when executed as herein required, acknowledged and recorded in the office of a recorder of deeds, shall impart notice to all persons of its contents, and all persons shall be entitled to rely on its provisions and of any amendments thereof, and any recital of fact contained therein.

TERMINATION OF TRUST.

19. This agreement and declaration of trust shall continue until the owners of seventy-five (75%) per cent of the issued and outstanding units of trustee certificates shall, by resolution adopted at any annual meeting or special meeting called and held as herein required, direct the directors to wind up the affairs of this trust at the expiration of such period of time thereafter as may be necessary to enable them or their successors in office to carry out and fulfill all of the contracts, certificates and other obligations then in force, or thereafter contracted; provided that no contract shall be made, certificate issued or obligations assumed after the date of the adoption of such resolution which is not to be fully matured within a period of twenty-one years. At the termination of this trust as above provided, the directors then in office shall become trustees for the purpose of winding up the affairs of the institution, converting its assets into cash and distributing same in a fair and equitable manner. They shall first pay all proper costs and expenses of closing up the business, including their reasonable charges in that behalf; second, they shall pay all general claims and distribute the balance of said trust fund pro rata and in proper proportions among the holder or holders of said trustee certificates as they may appear entitled thereto under the terms of this agreement.

AMENDMENT.

20. This agreement and declaration of trust may be amended at any annual or special meeting of the trustees, called and held as herein provided by the affirmative vote of a majority of the issued and outstanding trustees' certificates, cast as this instrument provides; provided that no such amend-

ment shall deprive any depositor or other class of certificate holders of any of their rights.

CHANGE OF OTHER LAWS.

21. The trustees may on the affirmative vote of two-thirds of the issued and outstanding units entitled to vote hereunder, by resolution direct the board of directors to accept the benefits of any law or laws of the State of Missouri, which may authorize the accumulation of a fund or funds, the accumulation of which is now contemplated under the terms of said Section 3431a R. S. Mo., 1909, and to do all things necessary to bring the assets under the provisions of any such law; provided that no such readjustment or change shall deprive any non-voting certificate holder of his or her rights hereunder.

EXECUTION OF TRUST AGREEMENT.

22. This agreement and declaration of trust shall become fully effective upon the signing hereof by the parties named as trustees hereunder. Persons accepted as trustees as herein provided for and to whom a trustee certificate is issued originally or by transfer of record, shall be held, deemed and taken, to be parties to this agreement and declaration of trust as fully as if they had actually executed this instrument as a party hereto. The secretary shall certify the name of each such trustee certificate holder to the Supervisor of Building and Loan Associations of the State of Missouri if requested by said supervisor.

This agreement and declaration of trust shall be executed by the present parties hereto in duplicate, one copy to be retained and copied of record by the secretary in the minutes

of the directors, and the other copy to be filed with the Supervisor of Building and Loan Associations at Jefferson City, Missouri.

This instrument is a re-execution of the agreement of October 27th, 1920, for the purpose of making corrections and changes therein.

In Witness Whereof the parties herein named have hereunto set their names to duplicate copies hereof as of the date herein first above written.

C. R. Bramblet,
G. L. Faulhaber,
F. C. Shryock,
By H. S. Bridgewater,
Atty. in Fact;
R. L. Gurney,
Samuel Niccolls,
J. B. Murphy,
By H. S. Bridgewater,
Atty. in Fact;
H. H. Scheer.

DENVER TOWNSITE COMPANY.

This trust was adjudicated in the Idaho Supreme Court in the case of A. T. Spotswood et al., Respts., v. J. B. Morris, Admrx., etc., of Benjamin F. Morris, Deceased, et al., Appts. 12 Idaho 360; 85 Pac. 1094; 6 L. R. A. (N. S.) 665. Trust Instrument is as follows:

"This Instrument, made this 18th day of September, 1895, Witnesseth, that whereas, Benjamin F. Morris was the owner of the following lands in Idaho county, Idaho, to wit: (Here follows a description of said 2,720.80 acres) * * * And he agreed with the following persons, to wit: Henry Dernham and William Kauffman, of Moscow, Idaho, John P. Vollmer and Robert Schleicher, of Lewiston, Idaho, and Wallace Scott, of Mt. Idaho, Idaho, to join them in a syndicate to purchase said lands of him and resell the same and divide the profits thereof, in which syndicate each of said persons should take and pay for a one-eighth share and be the owner of and entitled to a like portion of the profits thereof, and said Benjamin F. Morris should take and pay for a three-eighths share, and be the owner of and entitled to a like portion of the profits thereof * * *. And whereas, said Benjamin F. Morris has by deed of even date herewith conveyed to Robert Schleicher in trust for this syndicate according to these articles of agreement said 2,720.80 acres, all except the 160 acres last above described, subject to a mortgage on which there is due of principal $9,000 besides interest, and to the payment by the syndicate, including Benjamin F. Morris, of $4,320.00 of the purchase money, with interest thereon from the 1st day of May, 1895, at the rate of 10 per centum per annum until paid: Now, therefore, in order to facilitate the accomplishment of the purposes of said syndicate, we, the said parties, hereby organize ourselves into an

association, and agree as follows: (1) That the name of said association shall be the Denver Townsite Company, and the principal office of said association shall be at Lewiston, Idaho. (2) That the members of the association, and their executors, administrators, heirs and assigns, shall, in proportion to their interests therein, pay the obligations thereof, and share in the profits thereof. (3) That the title to said lands is to be subject to all the terms and provisions, powers and trusts, of these articles of agreement and the amendments and alterations thereof which may be made from time to time. (4) That this association shall not be dissolved, or any of the powers herein given, or which may be given, be revoked by any transfer at any time of the interest of any member thereof, or any part thereof, whether by act of the party, or by operation of law, or by the death of any member or members thereof, or their successor or successors, at any time. (5) That, in order to maintain and continue this association, no member or members, or successor or successors, thereof shall for five years from date hereof have any right or partition of said lands or any of them, but shall have such right thereafter. These articles of agreement shall be binding upon the parties, their assigns whether by act of party or operation of law, and their heirs, devisees, executors, and administrators. (6) The interests of the members of this association in the property thereof shall be represented by eight certificates, which shall be and are hereby agreed to be personal property. The members have only a right to the avails or proceeds of said property, the title thereto, both legal and equitable, remaining and being in said trustee, his successor or successors in trust. (Here follows a form of a shareholder's certificate.) * * * (8) The certificate of shares in, and interests of members of this association in, its property can only be transferred in the manner prescribed in the form of certificate last above

set forth, and not then unless all obligations of the assignor to the association are paid. No transfer shall be made for five days immediately before a meeting of the shareholders, or for five days immediately before the time when a dividend is payable. (9) That the annual meeting of the shareholders shall be held in Lewiston, Idaho, at the office of First National Bank of Lewiston, Idaho, on the second Tuesday of May each year, at 2 o'clock P. M. That no meeting of shareholders shall be competent to transact business unless a majority in interest of the shareholders shall be represented; but less than a majority may adjourn from day to day or until such time as may be deemed proper. That at such annual meeting a president, vice president, and secretary for the ensuing year shall be elected by ballot, to serve one year, until their successors are elected and qualified. Special meetings of the shareholders may be called by any three shareholders by notice in writing, by mail or otherwise, to meet at Lewiston, Idaho, at the office of the First National Bank of Lewiston, Idaho, at an hour to be designated in the notice, such notice to be mailed or served not less than five days prior to date of meeting. When all shareholders assemble and so agree, either in person or by proxy appointed in writing, a special meeting may be held without any notice. That at all meetings of the shareholders each shareholder shall be entitled to cast one vote for each certificate held by him. He may vote in person or by proxy appointed in writing. The president or presiding officer may vote his own share or shares, but shall not have power, in addition as presiding officer, to decide a tie vote. The secretary shall keep a record of each meeting. (10) That a majority in interest of the shareholders of this association, at any meeting thereof, shall have as full and ample power and authority to do, or authorize to be done, any and every thing of every nature whatsoever, as an indi-

vidual owner of said lands in fee simple would have, provided only that they cannot issue, or authorize the issue of, any negotiable instruments, or borrow money, except to renew, or extend, or take up, or pay off, a mortgage or vendor's lien on said lands or some part thereof. That the only other manner in which they can raise money (except from income or sale of property) is by levy of assessments as hereinafter provided, upon the shareholders. That nothing except the consent of all the shareholders shall authorize the creation of any personal liability against the shareholders, and all contracts entered into shall be limited to creating a liability against the property of the association. (11) The officers of this association shall consist of a president, vice president, and secretary, who shall be elected by the shareholders, and shall perform the duties usually appertaining to their respective officers, except that the secretary shall perform, also, the duties usually appertaining to the office of treasurer. They shall hold office for one year and until their successors are elected and qualified. * * * No person shall hold any of those offices unless he be a shareholder, and a transfer of his share as provided in these articles of agreement shall operate as a resignation by him. * * * (12) The secretary of this association is hereby required, authorized, and empowered to sell, contract for sale of, and convey, by such form of conveyance as he may deem best, all or any part of the lands, or lots, or blocks contained in the 2,720.80 acres above described, for such price or prices, and upon such terms, at public or private sale, as he may deem best, subject to the directions of the shareholders; and no purchaser need see to the application of the purchase money, or to any such directions of the shareholders, or to the qualifications of the secretary as such officer. He shall have these articles of agreement and said deed to him recorded in Idaho county. The secretary

shall also have power to sell all products which may be received from any of said lands when and for such prices and on such terms as he may deem best. He may, out of any money in his hands as secretary or treasurer, pay the taxes on said lands, insurance premiums on any property of the association, or any property on which it may have an encumbrance, and interest on any encumbrance or encumbrances on said lands or any part thereof, also all necessary repairs at the wells, or of fences or other property on said lands, and all expenses incident to construction of fences, made necessary by any changes in roads. He may take any action he may deem most for the interest of the association in the matter of any actions or proceedings of the county commissioners concerning roads. The secretary shall incur no obligations which shall altogether exceed $500. without additional authority. He may deposit any money on hand in his name as treasurer of Denver Townsite Company in any national bank and check out the same. He may procure such record books and stationery and blanks, from time to time, as may be necessary. He shall keep an account and record of the affairs of the company, and render accounts and reports at the annual meetings, and record the same in the record book of such meetings, and, whenever requested by vote at any meeting, render accounts and pay over any money due the Denver Townsite Company."

OAKALA FOOD ASSOCIATION.

Published by permission of John Stelk, former Judge of Chicago, Illinois, who is the Author of the following Trust:

THE PARTIES TO THE TRUST.

1. This Agreement and Declaration of Trust made this 1st day of November, A. D. 1922, by and between Sunny South Developing Company, Inc., a corporation organized and existing under the laws of the State of Alabama, of Oak, Alabama, for itself and its assigns, and JOHN STELK, ALBERT W. KELLER, and VIOLA STELK, for themselves and their successors, herein designated as Trustees, witnesseth, that:

INTENTION.

2. WHEREAS, the Sunny South Developing Company, Inc. desires to create an express trust to be known as the OAKALA FOOD ASSOCIATION for the purpose of conducting any or all of the business hereinafter more specifically set forth, and,

WHEREAS, it is possessed of property which it desires shall be used in the conduct of such business; and

WHEREAS, it desires to transfer, and convey such property to the Trustees herein as a Trust Estate to be used by said Trustees, and their successors, in the conduct of said business; and

WHEREAS, the Trustees desire to accept such property and hold and manage and dispose of the same in accordance with the agreements and covenants herein contained, and for the uses and purposes herein set forth:

DECLARATION OF TRUST.

3. NOW, THEREFORE, in consideration of the premises and

the mutual covenants hereinafter contained, it is mutually agreed as follows:

(a) The said Sunny South Developing Co. Inc. hereby conveys, grants, bargains, sells, transfers, assigns and delivers to the Trustees the following described land situated in the County of Baldwin and State of Alabama, to-wit: The southeast quarter of Section Twenty (20), Township eight (8) North, Range four (4), East of St. Stephen's Principal Meridian, receipt of which is hereby acknowledged by the Trustees.

(b) It is agreed that the land hereby conveyed to the Trustees, and all cash, securities and other property hereafter acquired by them as such Trustees, together with the proceeds, incomes, profits, increases and surplus thereof shall be and become and constitute a Trust Estate, to be held, controlled, managed and disposed of by the Trustees under the designation of OAKALA FOOD ASSOCIATION, for the benefit of the holders, from time to time, of beneficial interests in said Trust Estate, sometimes hereinafter called "beneficiaries" and "beneficial interests," in accordance with the agreements and covenants herein contained and for the uses and purposes herein set forth.

EXPRESS TRUST CREATED.

4. It is hereby expressly declared that an express trust and not a tenancy in common, association or partnership is hereby created, and that neither the trustees nor the holders of beneficial interests shall ever be liable hereunder as partners, associates or otherwise. Holders of Beneficial Interests shall have no right and no voice whatever, as such, in the management of the Trust Estate except as hereinafter provided.

IN CASE ESTATE IS WITHOUT TRUSTEES.

5. If, at any time, for any reason, this Trust Estate shall

be left without a trustee, then trustees may be appointed by any court of competent jurisdiction, upon application by one or more of the Holders of Beneficial Interests hereunder. The Holders of Beneficial Interests hereunder shall at no time have any voice in the selection of trustees hereunder, except through the medium of some court of competent jurisdiction, in the manner and under the circumstances aforesaid.

NUMBER OF TRUSTEES.

6. The trustees shall be three (3) in number and shall in all cases hold their office until their successors have been elected and shall have qualified and accepted the trust; provided, that the number of trustees may be increased or diminished at any time by the unanimous vote and decision of all of the said trustees; and the said trustees, by such unanimous vote and decision, shall have the right to designate in writing the trustee or trustees who shall retire upon any decrease in the number, and also to designate in writing the trustee or trustees who shall act as such upon any increase in the number thereof.

ELECTION OF TRUSTEES.

7. John Stelk, subject to the provisions hereof, shall act as trustee for three years; Albert W. Keller for two years, and Viola Stelk for one year. When the one year trusteeship of Viola Stelk expires, the remaining trustees shall elect her successor for a period of three years. When the term of Albert W. Keller as trustee expires, the then remaining trustees shall elect his successor for a period of three years, and when the term of John Stelk expires, as trustee, the then remaining trustees shall elect his successor for a period of three years. Thereafter, and yearly, the successor to the retiring trustee shall be

elected by the remaining trustees. If there is any increase at any time in the number of trustees, the terms of such trustee or trustees shall be so made that there shall be a yearly retiring and a yearly election of a trustee or trustees by the remaining trustees; but this provision shall not be construed to mean that a trustee may not be elected to succeed herself or himself.

VACANCIES OF TRUSTEES.

8. In case of the death, removal, resignation, unwillingness, or inability to act of one or more of the trustees, and a vacancy or vacancies shall thereby be caused, the remaining trustees shall elect a new trustee or trustees to fill such vacancy or vacancies. Upon the election and qualifications of a Trustee under the provisions of this instrument, the certificate of such election and qualification shall be signed by all the trustees and acknowledged by them in the manner and form that instruments of conveyances are required to be acknowledged by the laws of the State of Alabama, and shall be deposited with the Depository appointed by the trustees. Upon the election of any trustee, such person shall qualify by executing an acceptance of this Trust, which shall within ten days after such election, be deposited with the Depository of the Trustees. If the acceptance is not so deposited, the office shall be considered vacant and a new election shall be made. As soon as any trustee elected to fill a vacancy shall have qualified, the trust estate and the title thereto shall rest in the new trustee and the old trustees without any further act or conveyance. Until such vacancy is filled, the remaining trustee or trustees shall have all the title and shall act and have all powers of all the trustees hereunder. Where there are five or more trustees in office, each trustee shall be subject to removal at any time, with or without cause, by

the unanimous vote of all the remaining Trustees at a meeting of the Trustees duly held of which all the Trustees had at least three days prior notice.

THE BUSINESS OF THE ASSOCIATION.

9. The Trustees shall have the power, under the designation of OAKALA FOOD ASSOCIATION, to use the Trust Estate for the following purposes:

A. To engage in and carry on the business of: building and operating a canning and dehydration plant; an ice making, electric light, heat and water plant; cold storage and other warehouses, a potato curing house, pickeling vats and other facilities for the proper handling of meats, turtles, crabs, fish, oysters, shrimps, poultry, milk, eggs, butter, cheese and all sorts of fruits and vegetables; acquiring, establishing and operating wholesale and retail stores, clubs or places where such products can be sold; purchasing, selling, trading and dealing in trees, plants, seeds, fertilizers, sprays, farm and orchard machinery, tools and equipment live stock, feed, poultry and bees; teaching farmers and orchardists how to prepare, plant and cultivate their orchards, and farms, how to care for the live stock and poultry thereon, and how to harvest and dispose of the income and increase thereof; guaranteeing from time to time, a net minimum price for the farm and orchard products as will assure the farmer a fair profit over and above all legitimate expenses, provided, the crop is planted, cultivated and harvested according to instructions from, and under the directions of the trustees, under a contract with the trustees for a fixed number of years, and, provided further, that the trustees are under such contract, permitted to market the products and are allowed a certain percentage of the amount that may be obtained

by them over and above such guaranteed price in the nature of a premium; inaugurating a system of fast water, truck and rail transportation facilities between Oak and Mobile, Alabama, and between Oak and Pensacola, Florida, and between Oak and other points and obtain an extension of the Bay Minette, Foley and Fort Morgan Railroad from Foley to Oak, Alabama, or its vicinity; manufacturing bags, boxes, crates, hampers, baskets and other containers for the shipment of all products, and finding markets for such products and buying, selling and trading therein; establishing and conducting a state or national bank and a telephone system.

B. To engage in and carry on any other necessary and incidental business in connection with the foregoing which is calculated directly or indirectly to increase or enhance the value of the Trust Estate.

C. To buy, sell, acquire, own, mortgage, encumber, lease, manage, exchange, dispose of, and deal in the good-will, franchise, property, stocks, securities, beneficial interests, and shares of corporations, trusts and associations engaged in whole or in part in any business similar to any business above mentioned.

D. To buy, sell, license, acquire, own, mortgage, encumber, lease, manage, exchange, dispose of, and deal in franchises, contracts, concessions, leases, real estate, patents, patent rights, trade names, trade marks, copyrights, and any and all property of whatsoever nature, real, personal, or mixed, tangible or intangible, in any way believed by the Trustees to be valuable, necessary or incidental in connection with the carrying on of any business above mentioned.

E. To do all and every act and thing necessary or incidental in connection with the carrying on of any business above mentioned.

POWERS OF TRUSTEES.

10. In connection with the carrying on of any business above mentioned:

(a) The Trustees shall hold the legal title to the Trust Estate, and have the absolute control, management and disposition of the same and the absolute control and management of any and all business engaged in, to the same extent as natural persons might or could do, in any state and in any part of the world, as principals, agents, contractors, employers, employees, trustees, partners or otherwise.

(b) The Trustees shall have power to enter into, make, execute, and perform contracts, agreements, leases, obligations, and undertakings of every kind and nature with any person, persons, firm, organization, private or public corporation, quasi-public corporation and other body or individual.

(c) The Trustees shall have power to draw, make, accept, endorse, execute, pay, buy, sell and discount promissory notes, drafts, bills of exchange, bonds, warrants, debentures, and any and all other negotiable or non-negotiable evidences of indebtedness of whatsoever nature.

ADDITIONAL POWERS OF TRUSTEES.

11. The Trustees shall have full power to invest and reinvest, mortgage, sell, pledge and incumber the Trust Estate and its profits, income, increase, surplus and avails; to bring, defend or compromise any action or suit at law or in equity, to pay, settle, compromise, satisfy and collect judgments and decrees of whatsoever nature, and to engage and employ counsel for any and all such purposes.

DELEGATION OF POWERS OF TRUSTEES.

12. Any Trustee may, by written proxy or power of attorney, delegate his power as such for a period not to exceed thirty days at any one time, to any other Trustee, including the right to vote at all meetings of the Trustees, but not including the right to vote on a motion to remove a Trustee, or to make, amend, adopt or repeal any by-law.

MEETING OF TRUSTEES.

13. The Trustees shall meet at such times and places as they may fix from time to time by by-law or resolution. A record shall be made and kept of the business transactions at each meeting. The minutes of any meeting of the Trustees shall, as to any fact which they purport to state, be prima facie true, upon all questions of title depending in whole or in part thereupon or effecting the rights of third persons.

QUORUM OF TRUSTEES.

14. Any three trustees present in person or by proxy and not less than three shall constitute a quorum. At a meeting of the Trustees, the concurrence of all of the Trustees present or represented at the meeting shall not (except as otherwise herein provided) be necessary to the validity of any action taken by them; but the decision expressed by the vote of a majority of the Trustees shall be conclusive and binding.

SPECIAL MEETINGS.

15. Special meetings of the Trustees, in addition to those provided for in the by-laws shall be held from time to time upon a call of the Trustees, or a majority of them.

BY-LAWS AND RULES.

16. The Trustees may, at any meeting at which all of the Trustees are present, make, adopt, amend or repeal such by-laws and rules not inconsistent with the terms of this instrument as they may deem necessary or desirable for the conduct of their business or for the government of themselves, their officers, agents and servants.

AGENTS AND EMPLOYES.

17. The Trustees shall have the power to employ such help, including attorneys and solicitors, as they may from time to time deem necessary or expedient. The Trustees shall agree with said help as to the amount of compensation to be paid; and they may likewise pay to themselves such compensation for their own services as trustees or officers as they may deem reasonable and fair.

OFFICERS AND SERVANTS.

18. The Trustees shall annually elect from their number a President, and in their discretion, a Vice-President. They shall also annually elect a Secretary and a Treasurer. The office of Secretary and Treasurer may be held by one and the same person, and any person or persons elected to such office or offices need not be a Trustee. The Trustees shall have authority to elect temporary officers to serve during the absence of or disability of regular officers and have full authority to appoint and remove officers, agents, managers, employees, clerks and counsel, with or without cause.

DUTIES OF OFFICERS.

19. The President shall preside at all meetings of the Trus-

tees, and shall perform such other duties as the by-laws or the Trustees may prescribe and require. The Vice-President shall perform the duties of the President in his absence; and shall perform such other duties as the by-laws or the Trustees shall prescribe or require. The Secretary shall attend all meetings of the Trustees, keep minutes of such meetings, keep such records and books and render such services as may be prescribed by the by-laws or imposed upon him or her from time to time by the Trustees. The certificate of the Secretary of the correctness of any copy or of any record in the Secretary's office shall be prima facie evidence. The Treasurer shall perform the duties usually incident to such position, and such as may be prescribed by the by-laws or required from time to time by the Trustees.

The Trustees shall constitute as their depository the Treasurer of the Trustees, who, as such, shall be tendered a copy of any instrument hereinafter designated.

DUTIES OF DEPOSITORY.

20. Such Depository shall have the custody of one of the originals of the Declaration of Trust and of any and all instruments altering or adding to the same, or containing the resignation of one or more Trustees, or showing the election of one or more persons to be Trustees to fill vacancies, or otherwise affecting this Declaration of Trust or the duties, powers or liabilities of the Trustees. Such Depository shall give good and sufficient bonds for the safekeeping and return of all moneys, papers or property entrusted to his or her care either as depository or as treasurer. Such depository shall be bound to deliver, on demand, to any new depository selected by the Trustees all such documents and records.

EVIDENCE OF ACTS OF TRUSTEES.

21. For purposes of convenience, the trustees may select one or more of their number to act for and in behalf of all of the Trustees respecting any given matter as respecting any given class of matters. All action of the Trustees, or other exercise by them of powers hereby conferred, except, the execution of written instruments signed by all of the Trustees then acting, shall be by officer, agent, manager, attorney or other representative acting under the authority of a resolution or by-law passed or adopted at a meeting of the Trustees duly called and held, or by a Trustee or Trustees acting under such authority; and any action of the Trustee, or other exercise by them, of the powers hereby conferred, thru an officer, agent, manager, attorney or other representative thereunto thus authorized, or by a Trustee or Trustees thereunto thus duly authorized, shall, except as otherwise provided herein, be valid and binding upon the Trust Estate at law and in equity.

STATEMENTS BY TRUSTEES OR OFFICERS.

22. So far as strangers to this trust are concerned, a statement in writing by the Trustees, or by any number of said trustees, authorized by all of the trustees to act in that behalf, directing a particular act to be done, shall be conclusive evidence in favor of such strangers that such act is within the power of the trustees and no purchaser or purchasers from the trustees, and no person dealing with the trustees, shall be obliged to see to the application of any purchase money, or of any other consideration paid, or delivered by or for said purchaser to or for said trustees. Copies of all documents and records in the custody of Depository, duly certified, and certificates as to who are Trustees or the CESTUI QUE TRUSTS, or the like, duly

signed by the president, and attested by the Secretary or Treasurer shall be conclusive evidence as against the Trust Estate upon the matters certified to, and shall have all the effects of the original.

CONTRACTS OF TRUSTEES.

23. In every contract, or order, or obligation which the trustees shall give or enter into, they shall stipulate and such stipulation shall be binding, that the trustees do not sign said document as individuals but as trustees, and shall not be held personally liable thereunder, and the party or parties dealing with such trustees shall be obliged to look to the trust estate for the satisfaction of any such contract, order or obligation. The Trustees shall adopt a common seal, on which shall be impressed the following: "Oakala Food Association, Oak, Alabama, Trustees Seal," and use or cause the same to be used, in attestation of such instruments as to them may seem proper. Said Trustees shall sign all documents of every kind as follows: "Oakala Food Association, by .....
.....
.....
Trustees.

Said Trustees hereby sign as trustees, and not as individuals."

NO LIABILITY FOR ERRORS.

24. The Trustees shall not be liable for errors of judgment either in holding or disposing of property originally conveyed to them, or in afterwards acquiring and holding or disposing of additional property, or for any losses arising out of any investments; nor shall they be liable for any act or for any failure to act, in any given matter in the execution of this trust in

good faith; nor shall they be liable for the acts and omissions of each other, or of any servant or employee and they shall not be required to give bond to secure the performance of this trust by them. Each trustee, however, shall be liable for his or her own wilful and corrupt breach of trust or misconduct.

INDEMNITY TO TRUSTEE.

25. Each Trustee shall be indemnified by, and receive reimbursement from the Trust Estate against any and all personal liability, claims, damages, or loss incurred or suffered by him or her in the administration of the Trust Estate, or any part or parts thereof, or in doing an act on account of his or her being a Trustee, except such liability, claim, damages, or loss as may result from his or her personal and wilful default.

DIFFERENT CLASSES OF BENEFICIAL INTERESTS.

26. There shall be issued two thousand (2000) preferred beneficial interests, to be known as Class "A", of the par value of Ten ($10.00) Dollars each; three thousand (3000) common beneficial interests, to be known as Class "B", of the par value of Ten ($10.00) Dollars each; and two thousand (2000) preferred beneficial interests, to be known as Class "C", of the par value of Ten ($10.00) Dollars each. With each beneficial interest of Class "A", there shall be given as a bonus and without any cost or charge whatsoever, one Class "B" beneficial interest.

DIVIDENDS ON BENEFICIAL INTERESTS.

27. Out of the profits, the holders of the preferred beneficial interests, known as Class "A" certificates, shall be entitled to receive a dividend of seven per cent (7%) per annum on

each preferred Class "A" beneficial interest before any dividends shall be paid on Class "B" and Class "C" beneficial interests. The preference on Class "A" certificates shall be cumulative, dividends shall be payable quarterly. The holders of the common beneficial interests, known as Class "B" certificates, shall be entitled to receive, after the payment of the dividend on the beneficial interests, known as Class "A", a dividend of not to exceed seven per cent (7%) per annum, on each common Class "B" beneficial interest, before any dividends shall be paid on the Class "C" beneficial interests.

ADDITIONAL EARNINGS.

28. If, after the payment of dividends as hereinabove provided, on the beneficial interests, known as Classes "A" and "B" a surplus or net profit remains, the trustees may, in their discretion declare a further dividend, payable at such time or times as they may deem advisable, which said dividend shall be distributed among holders of beneficial interests in such proportions as the trustees may determine.

SPECIAL DIVIDENDS.

29. The holders of preferred beneficial interests, represented by certificates of Class "C" shall be at all times entitled to a discount or reduction on the retail price on the purchases of goods, wares, and merchandise, or any products which may be offered for sale by the trustees, such discount or reduction shall be fixed from time to time by the trustees, but in no event shall such discount or reduction of said retail price be less than 5% nor more than 20% of the aggregate amount of such purchases, said discount or reduction to be payable or allowable at

such times and in such manner as may be determined by the trustees.

CERTIFICATES MAY BE CALLED IN FOR PAYMENT.

30. The preferred beneficial interests, known as Class "A" and Class "C" shall be callable and may be retired at any time after five years from the date of issue, at the rate of $10.00 per beneficial interest, together with any accumulations of dividends which may have accrued thereon.

CERTIFICATES CLASS "A".

31. As evidence of the ownership of the Class "A" preferred beneficial interests hereunder, the trustees shall cause to be issued to each Class "A" preferred beneficial holder a transferable negotiable certificate, which shall be substantially in the following form.

"Number OAKALA FOOD ASSOCIATION Beneficial
——— General Offices: Oak, Baldwin Co., Ala. Interests
Par value AN EXPRESS TRUST ———
$10.00 Class "A"

This certifies that.....is the holder of .....Class "A" preferred Beneficial Interests in OAKALA FOOD ASSOCIATION, of the par value of Ten ($10.00) Dollars, fully paid and non-assessable, subject to the Declaration of Trust, creating said Association, dated November 1st, and recorded in the office of the Judge of the Probate Court in and for Baldwin County, Alabama, at Bay Minette, the County Seat, and transferrable only on the books of the Trustees, in person or by attorney, upon surrender of this certificate properly endorsed.

IN WITNESS WHEREOF, the Trustees have issued this Certificate on this .....day of.....A. D. 192...

.....
.....
.....
Trustees."

CERTIFICATE CLASS "B".

32. As evidence of the ownership of Class "B" common beneficial interests hereunder, the Trustees shall cause to be issued to each beneficial holder of Class "B" certificates a transferable negotiable certificate, which shall be substantially in the form provided for as to Class "A" excepting to change the words "preferred" to "common" and the letter "A" to "B".

CERTIFICATE CLASS "C".

33. As evidence of the ownership of Class "C" preferred beneficial interests hereunder, the trustees shall cause to be issued to each Class "C" preferred beneficial holder a transferable negotiable certificate, which shall be substantially in the form provided for as to Class "A" excepting for the change of the letter "A" to "C".

REVERSE SIDE OF CERTIFICATES.

34. On the reverse side of said Certificates shall appear the following:

"FOR VALUE RECEIVED....hereby sell, assign and transfer unto.....Beneficial Interests described in the within Certificate and do hereby irrevocably constitute and appoint.....Attorney to transfer the same on the books of the within named Trust with full power of substitution in the premises.

Dated.....19.....

.....

In presence of

.....

In addition thereto there shall be endorsed on reverse side of

said certificates a synopsis of paragraphs 27, 28, 29, 30, 40, 50 to 55, substantially, as follows:

"*Note.* Paragraphs 27, 28, 29 of the Declaration of Trust provide that Class "A" Certificates shall receive at least 7% cumulative dividend per year payable quarterly. Class "B" shall receive 7%, such a dividend as the trustees may from time to time designate. Class "C" shall receive discounts of 5% to 20% on purchases from the Trust Estate and in addition shall share in the excess profits in such an amount and at such times as the trustees may from time to time determine after dividends have been paid on Class "A" and Class "B".

Paragraph 30 provides that certificates of Classes "A" and "C" may be called in and retired at any time after five years from the date of their issue at par value with accumulated dividends.

Paragraph 40 provides that at no time and under no circumstances and in no form whatever can a certificate holder be made liable for anything connected with the Trust Estate.

Paragraphs 50 to 55 provide for an annual meeting of the certificate holders and the election of an Advisory Board to watch and protect their interests"

ADDITIONAL CERTIFICATES.

35. In addition to the Beneficial Interests hereinabove provided for and described, the said Trustees may, as frequently as they desire, issue other and additional certificates for common or preferred beneficial interests at such time or times, to such an extent and in such quantities, as they may deem necessary and proper, to any person or persons who may have paid to them as such trustees, or, who shall pay to them as such trustees, the sum of not less than $10.00 or any multiple thereof, for any beneficial interest in the trust estate hereby created.

SUBSTITUTE CERTIFICATES.

36. In consideration of the land which has been transferred

to the Trustees by the Sunny South Developing Company, Inc. there shall be issued to it 1000 Class "A" and 1000 Class "B" beneficial interests, representing the fair cash market value of said land. In consideration of the services rendered in and about the formation of this Trust by John Stelk and Albert W. Keller, two of the Trustees, there shall be issued to the said John Stelk Three Hundred Class "B" Beneficial Certificates, and to Albert W. Keller Two Hundred Class "B" Beneficial Certificates, which is to be in full payment and satisfaction of the services rendered by them until the signing and execution of this Instrument, leaving 1000 Class "A" Beneficial Interests 1500 Class "B" Beneficial Interests and 2000 Class "C" Beneficial Interests, to be dealt with and disposed of by the trustees for the benefit of the Estate, as provided herein. Certificates representing Class "A" beneficial interests and Class "C" beneficial interests now or hereafter issued, shall be sold by the trustees for not less than $10.00 per beneficial interest, on such terms of payment as they may decide, provided however, that the trustees may allow a sum of not to exceed $2.50 per beneficial interest for commission, expenses or services in and about such sale. The trustees may fix such terms as to them may seem expedient for the acquisition of such additional beneficiary certificate holders. The Trustees may from time to time, in their discretion, invite and receive subscriptions for beneficial interests, in this estate, either in cash or in property in their discretion, for the purpose of increasing the capital investment of the trust estate, subject always to the terms and provisions of this instrument, and accept or reject the same.

SALE ON INSTALLMENT PLAN.

38. In case any person agrees to subscribe for beneficial interests in this trust and to pay his or her subscription therefor

in installments, the trustees shall have full power and discretion to collect such payments upon such terms and conditions as they may see fit to impose, and to receive the same either in property at its fair cash market value, or in cash, as they may elect. If any person having subscribed for a beneficial interest or for beneficial interests hereunder upon the installment plan shall neglect to pay any installment at any time specified, the trustees may, if they see fit, cancel the subscription of such person and declare the amount of his or her payment, if any, forfeited to the Trust Estate.

WHO CONSIDERED BENEFICIARY.

39. The person in whose name a certificate stands recorded upon the books of this Trust shall be conclusively considered by the Trustees to be the beneficiary and entitled to such rights and benefits as are evidenced thereby, and the Trustees shall not be affected by any notice to the contrary, either actual or constructive; and it shall not be the duty of the Trustees upon transferring such certificate or paying dividends thereon or distributing assets upon liquidation of the Trust Estate, or at any time, to inquire in any way, into the relations of assignor and assignee, pledgor or pledgee, Trustee and CESTUI QUE TRUST, guardian and ward, or into any other similar relations with respect to said certificate or any right or interest therein. The Trustees shall be under no liability or responsibility of any kind or character for making or causing to be made upon the books of the Trust, the transfer of any certificate out of the name of the prior registered holder of the certificate, in pursuant to an assignment thereof, by such prior registered holder or upon or in pursuance to other authority, in writing, signed by such prior registered holder. Those who may hereafter become benefi-

ciaries under this trust shall have the same rights as the original beneficiaries hereunder, and shall in like manner be bound by the terms and conditions of this agreement and declaration of trust.

NO LIABILITY AS TO BENEFICIARIES.

40. No assessment or personal liability or obligation shall under any circumstances or in any event be made or imposed upon the beneficiaries as such, or any of them, without the consent, in writing, of each and every such beneficiary, and the endorsement or notation of such consent and of the extent and terms thereof, upon each outstanding beneficiary certificate. Neither the Trustees nor any of them, nor any of the officers, manager or employees of them, shall have any right, power or authority under any circumstances or in any event to act as agent of the beneficiaries or any of them, or to create or incur any liability or obligation for them or on their account. The Holders of Beneficial Interests, nor any of them, shall be deemed in any way whatever liable or responsible as partners, or in any manner liable otherwise than in this instrument specifically provided.

DISABILITY OF BENEFICIARY.

41. The Executor, administrator, or assigns of any deceased certificate holder shall succeed to the rights of such decedent under this trust, and, upon the surrender of the certificate or certificates for the interests owned by said deceased certificate holder, a new certificate or certificates may be issued in lieu thereof.

RIGHTS OF BENEFICIARY.

42. The ownership of beneficial interests hereunder shall

not entitle the holder to any title whatsoever in the trust property, and the owner of any beneficial interest herein hereby expressly waives and releases any and all claims to demand or enforce the return of the money invested in this trust, or any equivalent thereof, or the increase thereof, either at law or in equity, directly or indirectly, or to call for a partition or division of the trust property or any part thereof, nor shall the owner of any beneficial interests make any attack upon the trustees herein or upon the Trust Estate in any court, unless such owner is supported and joined in such attack by the owners of at least a majority of the then outstanding beneficial interests and every owner of beneficial interests herein, now existing or who may hereafter become such, expressly covenants and agrees with the trustees herein and all owners of beneficial interests that in no case shall any court be called upon to dissolve the trust created hereby, but that the court shall only be appealed to for the purpose of correcting the evil, by compelling the trustees to carry out the trust created hereby, and on their refusal, to remove them and appoint others in their places.

PROFITS—DIVIDENDS.

43. All profits arising from the operation of the trust estate shall be and become a part of the trust estate as fast as accumulated and shall be dealt with as the trustees may see fit. The trustees may, from time to time, declare and pay dividends out of the earnings as received by them, but the amount of such dividends and the payment thereof shall be wholly in the discretion of the trustees; provided, that the preferred certificates, as herein provided for, shall have such prior and preferred rights as are herein mentioned.

LIABILITY FOR DEBTS.

44. The beneficiaries and their assigns and all persons and corporations by whom credit is extended, or with whom contracts are made, or who may have claims against the trustees, shall look only to the funds and property of the trust for the payment under such contract or claim, or for the payment of any debt, damage, judgment, decree, or of any money that may otherwise become due or payable to them from the trustees, as such; so that neither the trustees nor the certificate holders hereunder, present or future, shall be personally liable therefor.

GENERAL OFFICES.

45. The general offices of the trust estate shall be located at Oak, Baldwin County, Alabama, or at such other place or places as the trustees may, from time to time designate.

FISCAL YEAR.

46. The fiscal year of the trustees shall begin and end as the trustees may determine, provided, that unless otherwise determined by the trustees, the fiscal year shall be the calendar year.

NO DISSOLUTION OF TRUST.

47. This Trust shall not be dissolved or its business affected by the death, insolvency, or incapacity of one or more of the beneficiaries, nor shall death, insolvency, or incapacity entitle the legal representatives or heirs or assigns, voluntary or involuntary, of such deceased, insolvent or incapacitated beneficiary, to any accounting or to any action at law or equity, or otherwise against the Trustees, or against the Trust Estate, or any part thereof; but such legal representa-

tives, heirs, assigns, of such beneficiaries shall succeed to the rights of the deceased, insolvent or incapacitated beneficiary, subject to the terms of this Declaration of Trust, and shall succeed to nothing more.

TERMINATION OF TRUST.

48. If, at any time, the trustees deem it best so to do, they may terminate this trust and wind up the business thereof; and in any event, this trust shall terminate twenty-one years after the death of the last trustee named herein.

DISTRIBUTION OF ASSETS.

49. In the event of the termination of the trust Estate and of the distribution of the assets thereof, the holders of the common beneficial inerests, known as Class "B" certificates, shall divide the residue of the trust estate, after full payment to the holders of Class "A" and Class "C" certificates. All of the debts and expenses of the estate shall be paid before anything shall be distributed to the holders of any of the beneficial interests.

HOLDERS OF BENEFICIAL INTERESTS ANNUAL MEETING.

50. Holders of beneficial interests may hold an annual meeting at such time and place as they, from time to time, may by resolution determine. The first annual meeting of such holders shall be held at the Bienville Hotel, Mobile, Alabama, on the 2nd Tuesday in February, 1923, at 10:00 o'clock A. M. The meeting may be adjourned to another place and a later time by the vote of a majority of the holders present, counting individuals, and not interests.

ELECTION OF AN ADVISORY BOARD.

51. At the meeting on the Second Tuesday of February, 1923, or at any adjourned meeting thereof, the holders of Beneficial Interests may elect an Advisory Board, consisting of as many individuals as they may desire, whose duty shall be to watch over and protect the interests of the holders of beneficial interests in the Trust herein created. The term of office and the duties of the members of said Advisory Board shall be fixed and determined by said holders of beneficial interests. Said Advisory Board, nor any of its members, shall under any circumstances, have any vote or voice in the meetings of the Trustees, nor any right to dictate to said Trustees, or, in any manner whatever interfere with them in the exercise of their rights and the discharge of their duties, under the trust by this instrument created. The Trustees appointed herein and their successors, shall at no time or place be under the jurisdiction, direction or control in whole or in part of said Advisory Board, or any of its members.

HOW ADVISORY BOARD ELECTED.

52. At every annual meeting of the holders of Beneficial Interests each such Holder shall be entitled to cast one vote for each beneficial interest held in his name; which vote may be cast by him either in person or by proxy. All proxies shall be in writing, and shall be filed and recorded as the Holders of Beneficial Interests may direct.

In voting for the members of the Advisory Board, each Holder of a Beneficial Interest shall have the right to vote, in person or by proxy, for the number of such beneficial interests held or owned by him, for as many persons as there are members of the Advisory Board to be elected, or to cumulate said

interests and give one candidate as many votes as the number of members multiplied by the number of his interests shall equal, or to distribute them on the same principal among as many candidates as he shall think fit.

A quorum for the transaction of business at any meeting of Holders of Beneficial Interests shall consist of a number of members representing a majority of the beneficial interests issued and outstanding; but the members present at any meeting, though less than a quorum, may adjourn the meeting to a future time.

MEETING OF ADVISORY BOARD.

53. The holders of Beneficial Interests may provide that the Advisory Board shall meet at such times and places as may be designated by the Holders of Beneficial Interests; that it may make and unmake by-laws and rules for its own guidance; elect a set of officers; keep minutes of its meetings and make reports to the holders of Beneficial Interests, and lay such other duties upon said board, not in conflict with this instrument, as they may deem proper.

OBJECT OF ADVISORY BOARD.

54. The object of said Advisory Board shall only be to keep in touch with the Trustees appointed under this instrument, and their successors, and their meetings. Learn from all possible sources whether everything is being done by the trustees that should be done in order to faithfully carry out the terms of the Trust hereby created. To call the attention of the Trustees to any and all mismanagement or misconduct on the part of any of the Trustees, their officers or servants; report to the holders of Beneficial Interests from time to time just how

the Trust hereby created stands and is proceeding, and whether the Trustees are discharging their duty. Said Advisory Board shall, however, be very careful to first ascertain all the facts and weigh them carefully before making any attack upon the Trustees or their management of the Trust Estate.

DIFFERENT UNITS MAY BE ESTABLISHED.

55. In case the holders of Beneficial Interests become numerous and scattered as to place of residence, they may, at any of their annual meetings determine to divide themselves into units and elect one or more representatives from each unit to the Advisory Board. The details of such an arrangement is left entirely to the holders of Beneficial Interests.

RULES OF CONSTRUCTION.

56. In the construction of this Declaration of Trust, the following rules shall be observed unless such construction will be inconsistent with its manifest intent or repugnant to its context, that is to say:

First—All general provisions, terms, phrases and expressions shall be liberally construed in order that the true intent and meaning of the trust hereby created may be fully carried out.

Second—Words in the present tense include the future.

Third—Words importing the singular number may extend and be applied to several persons or things, and words importing the plural number may include the singular.

Fourth—Words importing the masculine gender may be applied to females.

Fifth—The word "person" or "persons" as well as all words referring to or importing persons, may extend and be applied to bodies, politic and corporate, as well as individuals.

DECLARATION SUBJECT TO INSPECTION.

57. A true copy of this agreement and Declaration of Trust shall be constantly on file at the office of the Trustees and shall be open to the inspection of the beneficiaries hereunder at all reasonable times.

CONCLUSION.

58. IN WITNESS WHEREOF, the Trustees hereinbefore mentioned, have hereunto set their hands and seals for themselves and their successors, in token of their acceptance of the agreements, conditions, and trust hereinbefore mentioned, and the Sunny South Developing Co. Inc. has caused this instrument to be signed by its President and attested by its Secretary and its Corporate Seal, pursuant to full and complete authority granted by its Board of Directors, for itself and its assigns in token of its acceptance, assent to, and approval of such agreements, conditions and trusts, on the day and year first above written.

SUNNY SOUTH DEVELOPING CO. Inc.

By:.....

President.

Attest:

.....

Secretary.

.....(SEAL)

.....(SEAL)

.....(SEAL)

Trustees.

STATE OF ALABAMA, }
BALDWIN COUNTY, } ss.

I,.....a Notary Public, in and for said State and County, do hereby certify that JOHN STELK, the President of the Sunny South Developing Company, Inc. and ALBERT W. KELLER, the Secretary of said company, whose names are signed to the foregoing conveyance as president and secretary of said company acknowledged before me, on this day, that being informed of the contents of said conveyance they as such officers and with full authority executed the same voluntarily on the day and date the same bears for and as the act of said company.

GIVEN under my hand and notarial seal this.....of .....A. D. 1922.

.....
Notary Public.

STATE OF ALABAMA, }
COUNTY OF BALDWIN, } ss.

I,.....a Notary Public in and for and residing in the County and State aforesaid, do hereby certify that JOHN STELK, ALBERT W. KELLER and VIOLA STELK, who are personally known to me to be the same persons whose names are subscribed to the foregoing instrument, appeared before me this day in person as trustees and acknowledged as such trustees, that being informed of the contents of said instrument, they executed the same voluntarily on the day the same bears date. I further certify that my commission is still in full force and effect.

Given under my hand and notarial seal this..... day of.....A. D. 1922.

.....
Notary Public.

REAL ESTATE TRUSTS.

Homan Real Estate Trust Deed, Boston Real Estate Trust Agreement and Warren Chambers Agreement and Declaration of Trust were adjudicated in the case of Priestley v. Burrill, 230 Mass. 452; 120 N. E. 100. Copy of the Trust Agreements are as follows:

HOMANS REAL ESTATE TRUST DEED.

Know all men by these presents that we, Robert Homans and Reginald Foster, both of Boston, in the county of Suffolk and commonwealth of Massachusetts, being about to take title to a certain parcel of land with the buildings thereon, numbered 50 Essex street, situated in said Boston, and bounded southeasterly on Chauncey street, southwesterly on Essex street, northwesterly on Harrison Avenue, and northerly, northwesterly again and northeasterly on land now or late of F. M. Frost et al., containing 5,186 square feet more or less and being all the land recently owned by the trustees under the will of John Homans late of said Boston who died in 1868, hereby declare that we will, and our heirs, successors, administrators and executors shall hold said parcel of land and any and all property, real and personal, which may be conveyed or transferred to us as trustees hereunder, upon the trusts hereinafter set forth for the benefit of the owners of the shares hereinafter described.

1. The term "trustees" hereinafter used shall mean not only those above mentioned, but whoever may be trustee or trustees for the time being. The term "shareholder" hereinafter used shall mean holder of record of a certificate of shares hereunder.

2. The trustees shall issue certificates of shares of the aggregate amount of two hundred and forty thousand dol-

lars divided into shares of the par value of one hundred dollars each, and shall deliver said certificates to the person by whom the parcel of land above described is conveyed to them delivering to each of said persons shares bearing the same proportion to the total amount of the shares to be issued as above stated as his or her undivided interest in said parcel bears to the total value of the same. The trustees shall also have the power to issue certificates for additional shares hereunder if they are authorized so to do by vote of a majority of the shareholders as provided in clause 10, but not otherwise.

3. The trustees shall have entire control and management of the trust property. They may mortgage or lease the same, or any part thereof, from time to time on such terms and for such times as they think best: Provided that they shall not mortgage said property or any part thereof for more than twenty thousand dollars unless authorized so to do by vote of a majority of the shareholders as provided in clause 10. They may also sell said property or any part thereof at any time and from time to time on such terms as they think best. They may borrow money for temporary exigencies or for adding to, repairing, rebuilding or furnishing any building on land held by them for erecting new buildings on such land in such manner and on such terms as they think best, and may give their notes as trustees therefor. No purchaser, mortgagee, lessee or lender shall be responsible for the application of money paid or loaned to the trustees. The trustees may exchange land and purchase additional land for the purpose of straightening or altering boundary lines, and may grant, release and acquire easements. They may from time to time hire suitable offices for the transaction of the business of the trust fund and may incur such other expenses and employ

such clerks and other servants, transfer agents, lawyers and brokers as they may think best, and they may execute, acknowledge and record any and all instruments necessary or convenient for the purposes of the trust. They or either of them may act as counsel when it is proper to employ counsel and receive reasonable compensation therefor. They may make all such contracts and do all such things as they think best for the maintenance and management of the trust property and of the trust and may pay all expenses out of any assets of the trust.

4. The compensation of the trustees for their services as such shall amount to five per cent. of the gross income of the trust property, and in case of a sale of said property or any part thereof, one per cent. of the price for which the same is sold.

5. The trustees shall be responsible only for a willful breach of trust, and any trustee only for his own acts; and no trustee shall be required to give a bond. Any trustee may resign his office by a written instrument recorded with Suffolk deeds.

6. The number of trustees hereunder shall be kept at two, and each new trustee shall have the same powers as if originally named herein. In case said Reginald Foster ceases to be a trustee hereunder before the termination of the trust his successor shall be appointed by the Old Colony Trust Company, a corporation organized under the laws of said commonwealth and having a usual place of business in said Boston, by a writing recorded with said deeds, if said corporation is at the time the guardian of any child of the late Caroline Homans Priestley, wife of Neville Priestley, who is then a shareholder hereunder, but not otherwise.

7. When any trustee is absent from the commonwealth

aforesaid, or unable to perform his duties, the remaining trustee shall have the power to act: Provided that in no case shall one trustee so acting do any act affecting the title of the trust property or incur any debt or liability exceeding in the aggregate five thousand dollars during any such period of absence or disability; and the certificate of any trustee as to such absence or disability shall be conclusive.

8. The trustees shall annually or oftener in their discretion divide the net income from the trust property among the shareholders: Provided, however, that the trustees may set aside before paying any dividend whatever sum they see fit as a sinking or contingent fund, to be applied to repaying loans made by the trustees, whether unsecured or secured by mortgage on the trust property or otherwise; to making repairs to and alterations in said property; and to meeting extraordinary expenses. They may invest and reinvest said fund and any money they may have on hand at any time in any securities they see fit. Their decision as to what constitutes net income shall be conclusive on all parties.

9. The trustees may call meetings of shareholders at any time, and shall do so upon the written request of any shareholder. Notices of meetings shall be given at least five days beforehand by mail and every such notice shall state the purpose of the meeting called. Such notices shall be binding upon each shareholder if mailed postage prepaid to the address last given by him to the trustees, or in default thereof to his last known place of business or abode: Provided that notice to any shareholder who is a minor may be given to his guardian instead of to him. Notices shall be deemed to be given at the time that they are mailed as above stated.

10. Shareholders may vote at meetings in person or by proxy and in case any shareholder is a minor, a proxy exe-

cuted by his guardian will be sufficient. The holders of a majority of the entire number of shares outstanding may, by vote at any meeting called for the purpose, authorize the trustees to issue shares hereunder in addition to those provided for by clause 2 and fix the price at which the same shall be issued, and may authorize the trustees to mortgage the trust property or any part thereof for any amount exceeding twenty thousand dollars for such times and on such terms as they see fit. The statements of one or more of the trustees contained in certificates relating to meetings of the shareholders, or other matters connected with the trust, and recorded with Suffolk Deeds, shall be conclusive upon all parties as to the facts therein stated.

11. The trustees shall not have any power or authority to enter into any contract that shall bind or affect the shareholders personally, or call upon them for any payment whatsoever other than the amounts of the respective subscriptions; but the trustees shall be entitled to indemnity against any and all liabilities which they may incur, or to which they may be subject, out of the trust property, and may make any contract hereby authorized in such manner that the same and any liability thereunder shall be enforceable against the trust property, and all persons or corporations extending credit to, contracting with, or having any claims against the trustees shall look only to the property of the trust for the payment of any such contract or claim, or for the payment of any debt, damage, judgment or decree, or of any money that may otherwise become due or payable to or from the trustees, so that neither any trustee nor shareholder, present or future, shall be personally liable therefor.

12. Shares hereunder shall be personal property and shall be transferable only on the books of the trustees upon sur-

render of the certificate therefor. Transferees shall, upon issue of new certificates to them, become shareholders hereunder, and entitled to all the rights and subject to all the liabilities of the original subscribers hereto.

13. This trust, if not sooner terminated by sale of the property by the trustees, shall continue for twenty years after the death of the last surviving original trustee and of Katharine A. Homans, John Homans, Marian J. Homans, Helen Homans and William P. Homans, children of John Homans, late of said Boston, who died in 1903.

14. Upon the expiration of the said limit of twenty years the trustees shall sell any and all property then subject hereto. When all the trust property is sold either as provided in this clause or as hereinabove provided, the proceeds thereof after the payment of all the debts and expenses of the trust, the expenses of the sale, and the commissions of the trustees shall be divided among the shareholders in proportion to the number of shares owned by them of record. In case any portion of the trust property is sold or taken by eminent domain and any other property still remains subject to the trust, the trustees may either divide the proceeds of the sale or the damages obtained on account of the taking, after deducting the debts, expenses and commissions above mentioned or the expenses of obtaining such damages, among the shareholders in the proportions above stated, or may hold the same and apply them in such manner as they may see fit to the purposes of the trust.

In witness whereof we hereunto set our hands and seals this first day of November, 1905.

Robert Homans, (Seal.)
Reginald Foster. (Seal.)

BOSTON REAL ESTATE TRUST AGREEMENT.

The Boston Real Estate Trust Agreement and Declaration of Trust, Made This First Day of May, A. D. 1886; Copyright 1886 by Wm. Minot (for the Trustees).

We, the subscribers, hereby agree to and with each other, and in consideration of our mutual agreements as follows:

1. We agree to pay at any time within two years from the date hereof to the trustees hereunder, the amounts set against our names respectively, in such instalments and at such times as said trustees may require, but they shall not require any payment until the total amount subscribed amounts to two million dollars. In case any subscriber neglects to pay any instalment of his subscription within twenty days after the date of call, the amount of his subscription then unpaid shall be canceled at the option of said trustees.

2. John Quincy Adams of Quincy, Robert Codman, Abbott Lawrence, Samuel Wells, and William Minot, Jr., of Boston, all of the commonwealth of Massachusetts, shall be and are hereby made trustees hereunder.

3. Notices delivered personally or mailed, with prepayment of postage, five days beforehand, to any subscriber hereto or any shareholder at the residence given on his subscription or stated in his certificate, or to the address given by him from time to time to said trustees shall be deemed binding.

4. Said trustees shall use all money paid to them as such, except as hereinafter provided, for the purchase and improvement of real estate in the commonwealth of Massachusetts, and all real estate so purchased shall be conveyed to them in joint tenancy as trustees hereunder.

5. Said trustees shall have as such as absolute control

over and disposal of all real estate held by them at any time under this trust as if they were the owners thereof including the power to sell for cash or credit, at public or private sale, to mortgage with or without power of sale, to lease or hire for improvement or otherwise for a term beyond the possible termination of this trust or for any less term, to let, to exchange, to release and to partition. But said trustees shall not mortgage any real estate held by them for more than thirty per cent. of the value of the property so mortgaged, as determined by the last preceding assessment made for the purpose of taxation. This provision shall not however affect the title of any mortgage and no purchaser or mortgagee shall be liable for the application of money paid or lent. In granting leases or making contracts for buildings or alterations or repairs of buildings the signatures of a majority of said trustees shall be sufficient. In all leases and mortgages it shall be stipulated that the shareholders shall not be personally liable thereon.

6. Said trustees may set aside not more than ten per cent. of the annual income, for a contingent fund, or sinking fund, or both. They shall divide the net income of the property held by them under this trust among the shareholders annually or oftener at their discretion and their decision as to what constitutes net income from time to time shall be final. Said contingent or sinking fund and any money waiting investment may be put at interest or invested and reinvested in interest bearing securities by said trustees at their discretion.

7. Said trustees may from time to time hire suitable offices for the transaction of the business of the trust, appoint such officers and agents, including an agent for procuring subscriptions to this agreement, as they may think best, fix their

compensation and define their duties. The compensation of said trustees shall not at any time exceed five per cent. of the income of the property held by them under this trust.

8. Said trustees shall issue certificates in such form as they shall deem best, for each sum of one thousand dollars or for multiples thereof paid to them under this agreement, but no certificate shall be issued for any less sum than one thousand dollars, which shall be deemed a share.

9. Shares may be transferred on the books of said trustees by the person named in the certificate thereof, his attorney or legal representative, upon the surrender of the certificate, and a new certificate shall be issued to the transferee, who shall thereupon become subject to the terms of this agreement, but no share shall be sold until the holder thereof shall have first in writing offered it for sale to said trustees, who shall as such trustees have the option for ten days after the receipt of such offer of buying the same at the last preceding appraisal made by them. They shall make such appraisal annually or oftener as they may deem best. Shares so purchased by said trustees may be held as part of said contingent or sinking fund, or sold by them at their discretion. Devises by will, distribution of the estates of persons dying intestate and distribution of trust funds among those entitled thereto upon the termination of trusts shall not be deemed sales for the purpose hereof.

10. Said trustees may from time to time at their discretion invite and receive further subscriptions for the purpose of increasing the capital of the trust giving preference upon such terms and conditions as they shall deem best to existing shareholders. All subscriptions shall be subject to the terms of this agreement.

11. No assessment shall ever be made upon the shareholders.

12. The books of said trustees shall always be open to the inspection of shareholders.

13. Any trustee under this agreement may resign his trust by a written instrument signed by him and acknowledged in the manner prescribed for the acknowledgment of deeds, and such instrument shall be recorded in the registry of deeds for the county of Suffolk in said commonwealth. Any vacancy occurring from any cause at any time in the number of said trustees shall be filled by the remaining trustees by an instrument in writing acknowledged and recorded as aforesaid, and such new trustee shall have the same power as if originally named herein. When any trustee is absent from the commonwealth or incapable by reason of disease, the other trustees shall have all the powers hereunder, and any trustee may by power of attorney delegate his powers for a period not exceeding six months at any one time to any other trustee or trustees hereunder, provided that in no case shall less than three trustees actually exercise the powers hereunder. The term "said trustees" used in this agreement shall be deemed to mean those who are or may be trustees for the time being. No trustee shall be required to give a bond.

14. This trust shall continue for twenty years after the death of the last survivor of the following named persons: (Naming 20 persons.)

Provided that upon the request of three fourths in value of the shareholders, signed and acknowledged in the manner prescribed for the acknowledgment of deeds, and recorded in said Suffolk registry of deeds, said trustees shall terminate the trust or convey the trust property to new or other trustees, or to a corporation, according to the terms of such re-

quest, and in the manner stated therein, being first duly indemnified for any outstanding obligation, and said trustees upon filing in said registry of deeds a certificate that they have complied with such request shall be under no further liability. In case this trust expires by the above limitation without action relative thereto by the shareholders, said trustees shall sell all property then held by them as such and divide the proceeds among the shareholders.

15. Said trustees shall be responsible only for a willful breach of trust, and each shall be responsible only for his own acts.

16. Meetings of the shareholders may be called by any two of the trustees and shall be called upon the written request of five or more shareholders. The shareholders may for their own government pass by-laws and elect necessary officers, and may instruct the trustees herein on any manner not inconsistent with the powers herein or hereafter given said trustees, or with the acquired rights of third parties. The vote or agreement in writing of three-fourths in value of the shareholders shall be binding upon all and upon the trustees and this agreement may be altered or added to accordingly, but the rights of third persons shall not be affected, nor shall any third person be deemed to have notice thereof, until a certificate setting forth such vote or agreement, signed by a majority of the trustees and duly acknowledged, shall be recorded in the registry of deeds for the county of Suffolk and such certificate shall be conclusive as to the validity of the vote certified and all facts therein stated. A like certificate so recorded shall also be conclusive as to all facts affecting title.

In witness whereof, we have hereunto set our hands and stated the amount of our respective subscriptions on the day and year above written.

(Signed by the trustees and by subscribers for shares to the aggregate amount of $2,000,000.)

WARREN CHAMBERS AGREEMENT AND DECLARATION OF TRUST.

An agreement and declaration of trust made by the subscribers, this twenty-sixth day of June A. D. 1895, for the purpose of purchasing certain real estate on Boylston street in the city of Boston and being the lots on which are now the buildings numbered 413, 415 and 421 on said street and erecting thereon a suitable building for the occupation of doctors, dentists, oculists and others.

1. The trustees under this agreement are authorized as such trustees to purchase said premises and any existing leases thereof and to proceed to the erection of a new building thereon as soon as practicable and may as such trustees make all necessary contracts and agreements for such purchase and for such new building, including any agreement they may think advisable for straightening or altering boundaries, and may if they deem expedient, for the adjustment of boundaries acquire additional adjoining estate or release portions of the trust estate. They may at any time procure the discharge or release of any mortgages, now existing on the whole or any part of said premises on such terms as they deem expedient, and they may at any time mortgage the whole or any part of said premises and the buildings they may erect thereon, for an amount not exceeding in all two hundred and fifty thousand (250,000) dollars, upon such terms and for such time as they may think best and may make leases of the property or any part thereof held by them on such terms as they think best. After the new building is completed, the trustees shall incur no debt or liability except such as may

be incidental to the management of the property held by them and then only for an amount not exceeding in the aggregate at any one time ten thousand (10,000) dollars. The trustees shall have no power to bind the shareholders personally and in every written contract they shall enter into reference shall be made to this declaration of trust and the person or corporation contracting with the trustees shall look to the funds and property of the trust for the payment under such contract, or for the payment of any debt, mortgage, judgment or decree or of any money that may otherwise become due, or payable by reason of the failure on the part of said trustees to perform such contract in whole or in part, and neither the trustees nor the shareholders present or future in this company shall be personally liable therefor.

2. The title of the trustees shall be "Trustees of the Warren Chambers" and any property conveyed to them under that description shall be held by them in trust under this agreement.

3. The trustees shall, if so instructed by the shareholders as hereinafter provided, take such action as they may deem best for the purpose of obtaining a charter for a corporation for the purposes aforesaid.

4. The trustees shall give receipts for installments on subscriptions when paid and when so much of the subscriptions shall have been paid as to the trustees seem necessary, they shall issue certificates of shares in exchange for such receipts. Such receipts and certificates shall be transferable only on the books of the trustees upon surrender thereof, all installments due having first been paid, and the acceptance of a receipt or certificate shall make the person named therein a party to this agreement. The term "shareholder" used in

this agreement shall mean holder of record of a receipt or a certificate for one or more shares.

5. In addition to their reasonable and proper expenses incurred in the management of the trust, the trustees shall be paid at the rate of three thousand (3,000) dollars per annum, from August 1, 1895, until the new building is completed and thereafter at the rate of fifteen hundred (1,500) dollars per annum to be divided among them as they may agree.

6. Said trustees may appoint such officers and agents as they may think best, fix their compensation and define their duties.

7. When any trustee is absent from the commonwealth or incapable for any reason of acting as said trustee, the other trustees shall have all the powers hereunder provided that in no case shall less than two trustees actually exercise the powers hereunder.

8. All taxes and assessments during construction, together with interest at the rate of four per cent. per annum, shall be added to the cost of the building, which interest shall be paid semiannually to the subscribers from the date of their respective payments of subscriptions until the substantial completion of said building. After the completion of said building, the trustees shall make such dividends among the shareholders as they may deem expedient. The cost of said building shall also include the sum of ten thousand (10,000) dollars to be paid to John B. Thomas and Edwin Read for their services and expenses in promoting this enterprise and procuring subscriptions to this agreement.

9. The trustees shall call meetings of the shareholders annually on the second Thursday in February, and shall report their receipts and expenses for the year ending on the

thirty-first of December preceding. They may call special meetings of the shareholders at any time and shall do so upon the written request of the holders of one-tenth of the shares.

10. Notices of meetings, of calls for payments of subscriptions, or for any other purpose, shall be deemed binding upon each subscriber and shareholder if mailed prepaid to the last address given by him to the trustees, or in default thereof to his last known place of business or abode. Notices of meetings shall be given five days beforehand and may be given by advertisement for two successive days in two daily papers published in said Boston or by mail at the option of the trustees. In notices of special meetings the purpose therefor shall be stated.

11. Shareholders may vote by proxy, being entitled to one vote for each share. At any annual meeting or special meeting called for that purpose, the holders of a majority of the entire number of shares may fill any vacancy existing in the number of trustees, may remove any or all of the trustees and elect others in their place, may authorize a sale or additional mortgage of the real estate, or any part thereof, held by the trustees, may authorize or instruct the trustees to purchase and build upon additional real estate and issue additional shares for that purpose anl may alter or amend this declaration of trust or substitute a new one in place hereof. For all other purposes at such meetings five shareholders representing one fifth of all the shares shall constitute a quorum. No such alterations or amendments of or substitution for this agreement or removal or appointment of trustees shall affect any person not having actual notice thereof until recorded in registry of deeds, for Suffolk county, nor shall any such alteration or amendment or other action affect rights, previously acquired, of any third person. A certificate signed

by the chairman of such meeting shall, if countersigned by at least one of the trustees, be conclusive evidence of the regularity of the meeting and of the vote having been passed by the requisite majority and of all facts stated in such vote or certificate material to title.

12. Any vacancy in the number of trustees may be filled by the remaining trustees, until the next annual meeting of the shareholders or special meeting called for the purpose of filling such vacancy. The acting trustees from time to time shall have all the powers of original trustees. Upon resignation, decease, removal or vacancy for any cause, the title of the outgoing trustees shall vest in the remaining trustees and upon the filling of any vacancy as aforesaid the title of the whole trust property shall vest in the new board jointly.

13. No sale or mortgage for any amount exceeding two hundred and fifty thousand (250,000) dollars of the real estate hereinbefore described or any part thereof shall be made by the trustees unless authorized by vote of the shareholders as provided above, except that the trustees may transfer all the property held by them to a corporation chartered, as provided in section 3 of this instrument or sell all such property at the expiration of the trust in default of action relative thereto by the shareholders.

14. This trust shall not continue in any event longer than twenty years after the death of the last surviving subscriber hereto.

15. No bond shall ever be required of any trustee hereunder and each trustee shall be liable only for his own acts and then only for willful breach of trust.

16. Any paper signed by the trustees or any of them or by the shareholders, or a copy of the record of any of their proceedings certified by any one of the trustees, which it may

be deemed desirable to record in the registry of deeds for the county of Suffolk may be acknowledged by any one of the trustees in the manner prescribed for the acknowledgment of deeds in Massachusetts.

17. The whole number of shares of this trust shall be thirty-five hundred (3,500) which shall represent all the property of said trust, subject to such mortgages as may be made by the trustees under the powers hereinbefore set forth.

18. We, the subscribers agree to take the number of shares set against our names respectively and to pay to the trustees therefor such amount, not exceeding one hundred (100) dollars for each share, as the trustees shall call for, in such installments and at such times as the trustees may require and in case any subscriber neglects to pay any installment required by the trustees, in twenty days after notice, the amount of his subscription then unpaid may be canceled at the option of the trustees who may accept another subscriber in his place.

19. The first trustees under this agreement shall be Francis Peabody, Jr., Alfred Bowditch, both of Boston, and Emor H. Harding, of Milton, all in the commonwealth of Massachusetts, who signify their acceptance of the trusts by subscribing their names hereto.

Francis Peabody, Jr. (Seal.)
Alfred Bowditch. (Seal.)
Emor H. Harding. (Seal.)

(Signatures of subscribers for an aggregate of 3,500 shares.)

AMERICAN MANUFACTURING COMPANY.

A decision in reference to this trust is reported in the chapter on Validity—Rights Distinguished from Law, Kinross v. Cooper. In this connection see also chapters—Rule Against Perpetuities and Difference Between Trust and Partnership.

THIS AGREEMENT AND DECLARATION OF TRUST, made this 30th day of October, A. D. 1918, by and between John W. Kinross, Geo. A. Caldwell, John A. Hoblit, S. W. Gasaway, Wm. Seefeldt, Wm. G. Peters and Wm. J. Peck, together with their assigns, herein designated as "Subscribers", and

John W. Kinross, Geo. A. Caldwell, John A. Hoblit, S. W. Gasaway together with their successors, herein designated as "trustees", WITNESSETH:

WHEREAS, it is desired by the subscribers hereto and their assigns, and such others as may become shareholders hereunder, to engage in the business hereinafter set forth, and to contribute therefor property or otherwise, for their interest therein as set forth by the number of shares set opposite the name of each subscriber respectively; and

WHEREAS, it is desired by the subscribers that the said persons named as trustees herein shall act as trustees under the terms and conditions set forth herein for the purpose of carrying on the business, and withholding all property which may come into their hands as Trustees aforesaid; and

WHEREAS, the said persons herein named as trustees are willing to account to the said subscribers as hereinafter set forth and upon the following terms and conditions:

NOW, THEREFORE, the Trustees hereby declare that they will hold the property and funds to be transferred to them, as well as other property which they may acquire as trus-

tees, together with the proceeds thereof, in trust, that they will engage such property and funds in the Manufacture and Sale of TRACTORS, AGRICULTURAL IMPLEMENTS AND OTHER DEVICES, and in the transaction of other business incidental thereto;

a. To acquire in any manner whatsoever, and to hold, own, lease, rent, maintain, improve, work, develop, and generally to deal in and with real, personal, and mixed property, and all interest or rights therein or incident thereto, without limitation as to amount or situation;

b. To acquire by purchase or otherwise, and to hold, own, mortgage, hypothecate, pledge, exchange, sell, and generally to deal in stocks, shares, bonds, notes and other securities of every nature whatsoever;

c. To lease, rent, maintain, and improve, develop, sell, pledge, exchange, mortgage, hypothecate, or otherwise dispose of any property of any kind;

d. To engage in the business of a manufacturer and seller of TRACTORS, AGRICULTURAL IMPLEMENTS, and other devices, to buy, sell and manufacture the same, and generally deal in all products, machinery, raw material, partly finished and finished material, appliances, devices, and methods used by them in connection with their business, and to engage in a business or industry whatsoever, whether specified herein or not;

e. To acquire in any manner whatsoever, and to hold, own, sell, assign, convey, lease, rent, or otherwise deal in real estate and personal property, and any and all things relating to or useful in connection with the business of the trust;

f. To apply for, obtain, register, purchase, lease, or to otherwise acquire, and to own, hold, use, operate, introduce, and to sell, assign, or otherwise dispose of, any trade-marks,

trade-names, patents, inventions, improvements or processes used in connection with or secured by or under letters patent of the United States or elsewhere, or otherwise, and use, exercise, develop, grant license in respect to, or otherwise turn to account, any such trade-marks, trade-names, patents, licenses, process and the like, of any such property or rights;

g. To advertise and otherwise exploit their goods and methods, to manage, control or dispose of the same in any part of the world for the benefit and profit, from time to time, of the certificates of shares issued hereunder, according to the priorities expressed in said certificates, and in the manner and subject to the stipulations herein contained; to wit:

ARTICLE I.

1. The trustees in their collective capacity, shall be designated, so far as possible and practicable, as the AMERICAN MANUFACTURING COMPANY, and under that name shall, so far as practicable, conduct all business and execute all instruments in writing in performance of their trust.

2. The trustees shall be four in number and shall be certificate holders. Their number may be increased or diminished at any annual meeting of the shareholders, or at any special meeting called for that purpose.

3. Of the trustees herein mentioned by name, John W. Kinross and John A. Hoblit shall hold office until the third annual meeting of the shareholders; Geo. A. Caldwell shall hold office until the second annual meeting of the shareholders; Wm. J. Peck shall hold office until the first annual meeting of the shareholders; except that said trustees, as well as other trustees hereinafter elected, shall in all cases hold office until their successors have been elected and accepted this trust.

4. The shareholders shall at each annual meeting, or adjournment thereof, elect one or more trustees, as the case may be, to serve for the term of three years next ensuing.

a. In case of death, resignation or inability to act of any of the trustees, the remaining trustees shall accept any resignation and fill the vacancy for the unexpired term.

5. As soon as any trustee elected by the shareholders, or by the remaining trustees to fill a vacancy, shall have accepted this trust, the trust estate shall vest in the new trustee, or trustees, without any further act or conveyance.

ARTICLE II.

1. The trustees shall hold the legal title to all property at any time included in the trust estate, and said property shall be held by the Trustees as joint tenants, and not as tenants in common, in trust for all the certificate holders in proportion to their respective interests as represented by the certificates of shares.

a. The trustees shall have the absolute, control, management and disposition of all of the trust estate, and shall likewise have the absolute control and conduct of all its business, and shall without further authority from the shareholders possess every power which they deem necessary or proper to execute the purposes of the trust.

b. They shall assume all contracts for and obligations and liabilities in connection with, or growing out of the purchase of the property assigned to them by the subscribers, and to the extent and value of such property, but not personally and shall agree to hold the subscribers and any persons associated with them, harmless and indemnified from and against loss, cost, expense or liability upon by reason of, or in connection with any such contract, obligation or liability.

c. They may adopt and use a common seal; they shall have power to vote in person or by proxy upon all shares of stock, bonds, mortgages, debentures, deeds or other written evidence of property rights belonging to the trust, and may collect, receive and receipt for all dividends thereon;

d. They may contract with companies, corporations or individuals in respect to any matters relating to the operation of the business;

e. They may collect, sue for, receive and receipt for all sums of money at any time coming to said trust;

f. They may employ counsel to begin, prosecute, defend or settle suits at law, in equity or otherwise, and to compromise or refer to arbitration any claim in favor of or against any trust;

g. They shall have power to improve and develop all property which may become a part of the trust estate, by the erection of building, or otherwise, as they shall deem proper, and to repair or rebuild any buildings; or let, exchange or lease the whole or any part or parts of the trust estate.

h. They may issue bonds, debentures, deeds, mortgages or other obligations from time to time for the purpose of the trust, and to secure the same by mortgage, deed or trust or otherwise;

i. They may make loans and advances of money upon open account or promissory notes, or other evidence of indebtedness, secured or unsecured;

j. May borrow money in such amounts, for such times and upon such terms, and upon such occasions as may be considered to the best interest of the trust estate;

l. They may also by a majority vote at a meeting called for that purpose, but not otherwise, exchange, upon such terms as they may agree, the stock or securities held by them

in any corporation or company, for the stock or securities of any other corporation or company, by consolidation or otherwise;

m. May loan money to any corporation, company or individual or may own, buy, sell or hold the capital stock or bonds of any corporation or company, and may subscribe for or acquire the capital stock of any corporation*oor* company doing a like business.

n. The trustees may sell, mortgage, pledge, encumber or dispose of any shares of stock, securities or other property from time to time held by them, upon such terms and for such purposes as they may approve;

o. They may borrow money for the purpose incidental to the proper management and conduct of the trust, and may pledge the property of said trust in such manner as they may deem best to secure said loans, but said borrowings shall not exceed in the aggregate $50,000.00 and they shall incur no debt or liability except such as may be incidental to the proper management of the property held by them and to the proper carrying out of their trust.

p. The trustees may make a general assignment of the assets of the trust for the benefit of the creditors of the said trust, when in the opinion of the Trustees occasion may demand, and such assignment shall be binding upon the certificate holders hereunder.

2. So far as strangers to this trust are concerned, a resolution of the trustees authorizing a particular act to be done, shall be conclusive evidence in favor of such strangers that such act is within the powers of the trustees, and no purchaser from the trustees shall be bound to see the application of the purchase money, or other consideration paid or delivered by or for said purchaser to or for said trustees.

ARTICLE III.

1. The trustees may hold meetings in such places and at such times as they may determine, and stated meetings shall be held from time to time upon the call of the President or a majority of the trustees.

a. A majority of the Board constitutes a quorum, and the concurrence of all the trustees shall not be necessary to the validity of any action done by them, but the wish of the majority present and by voting shall be conclusive evidence, except as herein specifically provided.

2. The trustees may make, adopt, amend or repeal such by-laws, rules and regulations, not inconsistent with the terms in this instrument, as they may deem necessary or desirable for the conduct of their business, or for the government of themselves, their servants, agents or representatives.

ARTICLE IV.

1. The trustees shall annually elect from among their number a President and Secretary of the Board, and may also annually elect or appoint either from among their number or from among the shareholders, a Vice-President and Treasurer;

a. They shall have authority to appoint such other officers, agents, attorneys or employees, as they may from time to time deem necessary or expedient for the conduct of their business;

b. They shall have authority to accept resignations, and to fill any vacancies in the offices of President, Vice-President, Secretary and Treasurer for the unexpired term, and shall likewise have authority to elect temporary officers to serve during the absence or disability of regular officers.

2. The president shall preside at all meetings of the trustees, shall sign all certificates and any instrument which he may be required to execute in the name of the company, and perform such other duties, and hold office for such period as may be determined by the trustees, or provided for in the by-laws.

a. The Vice-President, or Vice-Presidents, shall perform the duties of the President in event of his death, absence or incapacity, and perform and render such other services as may be prescribed or required by the trustees.

b. The Secretary shall countersign all said certificates, and shall attend all meetings of the certificate holders and of the trustees and keep the minutes of such meetings; he shall keep such records and books and render such services as may be prescribed, or be imposed upon him from time to time by the trustees.

c. The trustees may in their discretion, entrust the possession, care or custody of any moneys or other property of the trust estate, to the Treasurer or other officer, agent or employees, and the trustees shall not be personally liable or responsible for the fault of any officer, agent or employee.

d. The Treasurer shall perform all duties usually incident to such position, and such as may be prescribed, or required from time to time by the trustees.

3. The trustees shall fix the compensation of any or all officers and agents whom they may appoint, and are likewise authorized to pay to themselves such compensation for their services as they shall deem reasonable.

4. The trustees shall not be liable for errors of judgment, either in holding property originally conveyed to them, or in acquiring and afterward holding additional property, nor for any loss arising out of any investment, nor for any act or

omission to act, perform or omitted by them in the execution of this trust in good faith, nor shall they be liable for the acts and omissions of each other, or of any officer, agent, servant or person appointed by them or acting for them, and they shall not be obliged to give bond to secure the performance of this trust by them.

ARTICLE V.

1. The trustees shall issue certificates in the trust estate for the par value of One Hundred Dollars, to the persons contributing the trust estate in proportion to their contributions respectively; such certificates in the aggregate not to exceed Three Hundred Thousand Dollars ($300,000.00) said issue to be made in the discretion of the trustees for cash or such other property.

2. As evidence of the ownership of such shares, the trustees shall cause to be issued for each shareholder a negotiable certificate, which shall be in form of:

NUMBER DECLARATION OF TRUST. SHARE
AMERICAN MANUFACTURING COMPANY
Capitalization $300,000.00
Par Value $100.00

THIS CERTIFIES THAT.....is the holder of .....Shares of the Capital of the AMERICAN MANUFACTURING COMPANY, fully paid and non-assessable, subject to Declaration of Trust in favor of said Organization dated the.....day of October A. D. 1918, and recorded in the office of the Recorder of Deeds of..... County, Illinois, and transferable only on such books of the organization in person or by attorney upon surrender of this Certificate properly endorsed.

IN WITNESS WHEREOF, the said Organization has caused this Certificate to be signed by its duly authorized officers and its seal to be hereto affixed this.....day of.....A. D. 19.....

....
Secretary. President.

(Endorsement on Back of Certificate)

FOR VALUE RECEIVED.....hereby sell, assign and transfer unto.....Shares of the Capital represented by the within Certificate, and do hereby irrevocably constitute and appoint.....Attorney to transfer the said shares on the books of the within named organization, with full power to substitute in the Premises.

Dated.....19....

Presence of

.....

ARTICLE VI.

1. The trustees may issue and sell at public or private sale, and upon such terms and conditions, and for such prices as they may deem expedient, the shares hereunder.

a. The Trustees may also, from time to time, with the consent of the majority of the shareholder, issue such additional shares (in addition to the original capital hereinbefore provided) of such par value and in such numbers as they may deem necessary to provide added means to carry on the business of the trust, and they may sell such added shares at private or public sale, upon such terms and conditions and at such prices as they may deem expedient.

2. In case of loss or destruction of any certificate of shares issued by the trustees, the trustees may, under such conditions as they may deem expedient, issue new certificates in place of those lost or destroyed.

3. The trustees may from time to time declare and pay dividends out of net earnings from time to time received by them, but the amount of such dividends and payment of them shall be wholly in the discretion of the trustees.

ARTICLE VII.

1. The fiscal year of the trustees shall end on the 31st

day of December in each year. Annual meetings for the election of trustees, and for the transaction of other business shall be held in.....county, Illinois, on the first Monday of.....January, in each year, beginning with year 1919, of which meeting notice shall be given by the Secretary by mail, to each shareholder, at his or her registered address, at least ten days before such meeting.

2. Special meetings of the shareholders shall be held any time upon seven days notice given as above stated, when ordered by the President or a majority of the trustees. At all meetings of the shareholders, each holder of shares shall be entitled to one vote for each share held by him, and any shareholder may vote by proxy.

3. No business except to adjourn shall be transacted at any meetings of the shareholders, unless a majority of all the shares outstanding are present in person or proxy.

4. All questions before the meeting at which a quorum is present shall be determined by a majority vote of the shares entitled to vote thereat.

ARTICLE VIII.

1. The death of a shareholder or a trustee during the continuance of this trust shall not operate to determine the trust, nor shall it entitle the representative of the deceased shareholder to an accounting, or to take action in the Courts or elsewhere, against the trustees, but the executors, administrators or assigns of any deceased shareholder shall succeed to the rights of said decedent under this trust, upon surrender of the certificate for the shares owned by him.

2. The ownership of shares hereunder shall not entitle the shareholder to any title in or to the trust property what-

soever, or the right to call for a partition or division of the same, or for an accounting.

ARTICLE IX.

1. The trustees shall have no power to bind a shareholder personally, and the subscribers and their assigns and all persons and corporations extended credit to, contracted with or having any claim against the trustees, shall look only to the funds of and the property of the trust for payment under such contract or claim, or for the payment of any debt, damage, judgment, or any money that may otherwise become due or payable to them from the trustees, so that neither the trustees nor the shareholders, present or future, shall be personally liable therefor.

2. In every written contract, order or obligation which the trustees shall give or enter into, it shall be the duty of the trustees to stipulate that neither the trustees nor the shareholders shall be personally liable by reason of such order, contract or obligation.

3. The accounts and books of the trustees or any of them, shall be open to inspection of the shareholders at all reasonable times.

ARTICLE X.

1. This trust shall continue for the term of twenty-five years, at which time the then Board of Trustees shall proceed to wind up its affairs, liquidate its assets, and distribute the same among the holders of the shares according to their respective interests as represented by the certificates; PROVIDED, HOWEVER, that if prior to the expiration of this period, the holders of at least two-thirds of the shares then outstand-

ing shall, at a meeting called for that purpose vote to terminate or continue the trust, then said trust shall either terminate or continue for such further period as may then be determined.

2. For the purpose of winding up their affairs and liquidating the assets of the trust, the then Board of Trustees shall continue in office until such duties have been fully performed.

ARTICLE XI.

1. This agreement and Declaration of Trust may be altered or amended, except as regards the liability of the Trustees, at any annual or special meeting of the shareholders, with the consent of at least-two-thirds of the shares then outstanding, provided notice of the proposed amendment or alteration shall have been given in the call for the meeting; and in event of such amendment or alteration, the same shall be attached to and made a part of the Agreement and a copy thereof shall be filed with the Recorder of Deeds of Peoria, Illinois.

IN WITNESS WHEREOF, the said John W. Kinross, Geo. A. Caldwell, John A. Hoblit, Samuel W. Gasaway, Trustees hereunder, have hereunto set their hands and seals in token of their acceptance of the trust herein declared, for themselves and their successors:

John W Kinross	Seal.
Geo A Caldwell	Seal.
John A Hoblit	Seal.
Samuel W Gasaway	Seal.

And the said John W. Kinross, Geo. A. Caldwell, John A. Hoblit, Samuel W. Gasaway, Wm. J. Peck, William Seefeldt, and Wm. G. Peters, have hereunto set their hands and seals in

token of their assent to and approval of the terms of trust, for themselves and their assigns, the day and year first above mentioned and written.

John W Kinross	Seal.
Geo. A. Caldwell	Seal.
John A Hoblit	Seal.
Samuel W. Gasaway	Seal.
Wm J Peck	Seal.
Wm. Seefeldt	Seal.
Wm. G. Peters	Seal.

AMERICAN MANUFACTURING COMPANY

Declaration of Trust.

* * * * * *

TRUSTEES.

John W. Kinross	For three years
John A. Hoblit	For three years
Geo. A. Caldwell	For two years
Samuel W. Gasaway	For one year

* * * * * *

OFFICERS.

John W. Kinross,	President
George A. Caldwell,	Vice-President
Samuel W. Gasaway,	Secretary
John W. Kinross,	Treasurer

* * * * * *

STATE OF ILLINOIS } ss.
COUNTY OF }

Before me, the undersigned authority, personally came and appeared John W. Kinross, Geo. A. Caldwell, John A. Hoblit, Samuel W. Gasaway, William Seefeldt, Wm. G. Peters, and Wm. J. Peck, who signed the foregoing instrument before me and acknowledged that they had signed the same as their

voluntary act and deed and for the purpose therein set forth.

IN WITNESS WHEREOF, I have hereunto set my hand and seal of office this 30th day of October, A. D. 1918.

John H Cramer
Notary Public.

John H. Cramer
Notarial Seal
Peoria County, Ill.

GENERAL FORM OF TRUST AGREEMENT.

THIS AGREEMENT AND DECLARATION OF TRUST (hereinafter designated "Declaration of Trust"), made and entered into in the City of Chicago, State of Illinois, between....., ..., ..., ..., ..., ..., (here insert names of Trustees), together with their successors (hereinafter designated "Trustees"), and ....., ..., ..., ..., (here insert names of subscribers).

WITNESSETH, THAT:

WHEREAS, the said Subscribers propose to convey, assign, transfer and deliver, or cause to be conveyed, assigned, transferred and delivered to the Trustees certain lands and other property, the particulars whereof are specified in Schedules I, II, III, IV, V and VI, hereof respectively; and

WHEREAS, it is the purpose and intention that the Trust hereby created and designated as.....(here insert name of the Trust) shall manage, conduct and operate the said lands and property, and to conduct and carry on any business or enterprise in connection therewith, or incidental thereto which the Trustees may deem desirable for the best interest of the said lands and property; and

WHEREAS, the Trustees, for the purpose of defining the beneficial interests of the Subscribers, and their respective assigns in the said lands and property, have agreed to issue to such Subscribers, or to their respective nominees negotiable certificates for 25,000 shares of beneficial interest in the said Trust, in the following proportions, to wit:

Names of Beneficiaries	Number of Shares of Beneficial Interest
_____	10,000
_____	5,000
_____	5,000
_____	2,500
_____	2,500

NOW, THEREFORE, the Trustees hereby declare that they will hold the said lands and property to be acquired by them as aforesaid, as well as all other property which they may acquire as such Trustees, together with the proceeds and avails thereof (all of such property being hereinafter sometimes referred to as the "Trust Estate"), in Trust, to hold, manage and dispose of the same, and to collect, receive and distribute the net income thereof, for the benefit of the cestuis que trustent, from time to time, whose beneficial interests are represented by certificates for shares of beneficial interest issued hereunder, and in the manner and subject to the stipulations herein contained, to wit:

ARTICLE I.

Section 1. In so far as may be practicable and convenient, the Trustees shall manage the Trust Estate, execute all instruments of writing and do and perform all other things relating to this Trust under the name of..... And every duly authorized instrument executed in such name shall have the same effect as if executed in the name of the Trustees.

Section 2. ....., ..., ..., ..., ..., all of the said City of Chicago, shall be, and shall constitute the original Trustees hereunder.

In case of the death, resignation or inability at any time to

act of any of said Trustees or of any successor to any of them appointed under the provisions hereof, the vacancy thus created shall be filled by the remaining Trustees. As soon as the Trustee or Trustees so selected shall have accepted the terms of this Trust by an instrument of writing, the Trust Estate shall, without any further act or conveyance, forthwith vest in the new Trustee or Trustees jointly with the Trustee or Trustees remaining in office, with all the rights, title, interest, privileges, powers, duties and estate which the former Trustees possessed during their incumbency to the same extent as if such newly selected Trustee or Trustees had been original Trustees under this Trust.

Section 3. Any Trustee may resign his trust by a written instrument acknowledged in the manner prescribed for the acknowledgment of deeds and by sending by registered mail, the said instrument thus acknowledged, to the remaining trustees.

ARTICLE II.

Section 1. The Trustees are authorized and empowered:

(a) To manage, improve, protect, develop and maintain any of the lands and real estate belonging to this Trust or which may hereafter be held by the Trustees under this Trust, improved or unimproved and wheresoever situate, including town sites, town lots. farm, timber and grazing lands, fruit orchards, fruit and stock farms and all rights, easements and interests in such lands and real estate; in connection therewith to carry on and conduct agricultural operations of all kinds and to breed and raise cattle and live stock, and to sell or otherwise dispose of the products of such operations, including lumber, lumber products and logs; to sell, convey, transfer and convert the said properties for such price or consideration and upon

such terms, trusts and conditions as the Trustees may determine, and to grant leases of the whole or any part or parts of such lands or real estate for any term of years, beyond the possible termination of this Trust or for any less term, in possession or reversion or at will and with or without option to purchase, and to make allowances to, and make arrangements with, tenants and others, and to accept surrenders of leases and tenancies; to subdivide, resubdivide, partition, repartition or vacate subdivisions of, the said Trust properties, to exchange the same or any part or parts thereof for other properties, real or personal, to dedicate public ways and places, to grant easements of any kind; and to deal with the lands and real estate at any time belonging to this Trust, and every part thereof in all other ways and for such consideration as it would be lawful for any person owning the same to deal with the same, whether similar to or different from the ways above specified at any time or times hereafter.

(b) To conduct mining operations of all kinds as to property at any time belonging to this Trust and which may be suitable for those purposes, and in connection therewith to smelt, mill, reduce, prepare for the market, refine and otherwise treat minerals, ores and metals of all kinds, including fuel products, and to sell or otherwise dispose of for the benefit of this Trust the products and by-products resulting from such operations.

(c) To search and drill for, refine, pipe, store, transport, sell, manufacture and distribute gas, petroleum and other oils and any and all of their products and by-products as to property at any time belonging to this Trust, and which may be suitable for those purposes, and in connection therewith to construct, build, operate and maintain oil wells, gas wells, refineries, buildings, works, workshops, laboratories, machinery, power plants, sawmills, stores and warehouses; and to the extent the Trustees

may deem proper in respect to mining oil and gas operations, to acquire and deal in leases.

(d) To exercise any and all rights incident to the ownership or possession of securities and obligations of all kinds, of any corporation, trust, association, partnership or individual that at any time shall be subject to the trusts of these presents; and to transfer into the name of any person any shares of stock, or shares of interest or securities in, or of, any corporation, trust or association that at any time shall be subject to the trusts of these presents and to allow any such shares or securities to stand in the name of such person so long as the Trustees shall think proper for the purpose of qualifying such person as a director or officer of such corporation, trust or association, or otherwise, for the purpose of maintaining the organization of such corporation, trust or association.

(e) To collect and sue for, and to receive and to receipt for, all sums due to the Trustees; to represent the cestuis que trustent in all suits or legal proceedings in any court of law or equity, or before any body or tribunal; to commence such suits or proceedings, or to defend the same, and to employ counsel; to compound, compromise, abandon or adjust by arbitration or otherwise, any actions, suits, proceedings, disputes, claims, demands and things relating to this Trust, and to give time, with or without security, for the payment, or delivery, of any debts or property claimed in favor of this Trust and to pay or satisfy any debts or claims, upon any evidence that the Trustees may deem sufficient.

(f) To buy, acquire, own, hold or lease such real and personal property as the Trustees may think proper, suitable or convenient for any of their undertakings hereunder and to pledge, lease, incumber and to exchange, sell and otherwise dispose of such property whenever they deem it expedient for

and they shall have the absolute management and disposition thereof.

Section 3. Stated meetings of the Trustees shall be held at least once a month from time to time upon the call of any two of the Trustees. Two Trustees present in person shall constitute a quorum, and the affirmative vote of two Trustees shall be necessary to the validity of any action taken by the Trustees.

Section 4. Any Trustee, by written power of attorney, may delegate his powers as such, for a period not exceeding twelve months at any one time, to any other Trustee or Trustees, provided that in no case shall less than two Trustees, each acting in person, exercise the powers hereunder.

Section 5. The death or resignation of any of the Trustees, shall not operate to annul or terminate this Trust or to revoke any existing agency created pursuant to the terms of this instrument.

ARTICLE III.

Section 1. Each Trustee shall be indemnified by, and receive reimbursement from the Trust Estate for his expenses and disbursements, including counsel fees, and also in respect of all losses and liabilities by him incurred or suffered in administering the Trust Estate or any part thereof, except such as may arise from his personal or willful default. And for the payment of such expenses, disbursements, losses and liabilities the Trustees shall have a lien on the Trust Estate prior to any rights or interest of the cestuis que trustent thereto or therein.

Section 2. The receipt of the Trustees or any of them, or any of the agents, representatives or employees thereunto authorized, for moneys or property paid or delivered to them, or any of them, shall be an effectual discharge therefrom to the persons paying or delivering the same, and no person taking

tees may be necessary or expedient to promote, protect and conserve the Trust Estate, including the making of guaranties to secure the performance of contracts and obligations of other parties; and to charge the Trust Estate with any and all obligations of indebtedness incurred by the Trustees in the exercise by them of any or all of the foregoing powers conferred upon them, provided, however, the Trustees shall have no power or authority whatsoever to borrow money on the credit or on behalf of the cestuis que trustent personally, or to make any contract binding the cestuis que trustent personally for repayment of any money raised by mortgage, pledge, charge or other incumbrance in pursuance of the provisions hereof, or to make any contract or incur any liability whatsoever on behalf of the cestuis que trustent binding them personally.

(n) To pay themselves as Trustees hereunder, such compensation for their services as they may deem reasonable, and to employ and discharge such experts, counsel, representatives, agents, and employees of any kind as the Trustees may deem proper, define their tenure, fix their compensation and define their duties.

(o) Generally, to do all and singular, such things as may be necessary or advantageous in the execution of the foregoing powers, or any of them, and not inconsistent therewith, and to manage, control and conduct this Trust as fully as if the Trustees were the absolute owners of the Trust Estate.

The naming of any specific authority and powers herein shall not be construed as limiting the general powers conferred upon the Trustees.

Section 2. The Trustees shall have the entire title (legal and equitable) to, and the absolute and exclusive management and control of, all property at any time belonging to this Trust,

and they shall have the absolute management and disposition thereof.

Section 3. Stated meetings of the Trustees shall be held at least once a month from time to time upon the call of any two of the Trustees. Two Trustees present in person shall constitute a quorum, and the affirmative vote of two Trustees shall be necessary to the validity of any action taken by the Trustees.

Section 4. Any Trustee, by written power of attorney, may delegate his powers as such, for a period not exceeding twelve months at any one time, to any other Trustee or Trustees, provided that in no case shall less than two Trustees, each acting in person, exercise the powers hereunder.

Section 5. The death or resignation of any of the Trustees, shall not operate to annul or terminate this Trust or to revoke any existing agency created pursuant to the terms of this instrument.

ARTICLE III.

Section 1. Each Trustee shall be indemnified by, and receive reimbursement from the Trust Estate for his expenses and disbursements, including counsel fees, and also in respect of all losses and liabilities by him incurred or suffered in administering the Trust Estate or any part thereof, except such as may arise from his personal or willful default. And for the payment of such expenses, disbursements, losses and liabilities the Trustees shall have a lien on the Trust Estate prior to any rights or interest of the cestuis que trustent thereto or therein.

Section 2. The receipt of the Trustees or any of them, or any of the agents, representatives or employees thereunto authorized, for moneys or property paid or delivered to them, or any of them, shall be an effectual discharge therefrom to the persons paying or delivering the same, and no person taking

such receipt shall be bound to see to the application of such moneys or property. And no purchaser or person dealing with the Trustees shall be bound to see that the terms of this trust are complied with or to ascertain or inquire as to the existence or occurrence of any event or purpose in or for which a sale, mortgage, pledge or charge is herein authorized or directed or otherwise as to the purpose or regularity of any of the acts of the Trustees, or any of them purporting to be done in pursuance of any of the provisions or powers herein contained, or as to the regularity of the discharge, resignation or appointment of any Trustee. And no purchaser or person dealing with any Trustee purporting to act under any delegation of authority from any other Trustee shall be concerned to ascertain or inquire whether an occasion exists in which he is authorized so to act or in which such delegation is permitted or whether such delegated authority is still subsisting.

Section 3. Every note, bond, contract, instrument, certificate, share or undertaking and every other act or thing whatsoever executed or done by the Trustees, or any of them in connection with this Trust, shall be conclusively taken to have been executed or done only in their or his capacity of Trustees or Trustee under this Declaration of Trust, and such Trustees or Trustee shall not be personally liable thereon. Every note, bond, contract, instrument, certificate, share or undertaking made or issued by the Trustees shall recite that the same is executed or made by them, not individually, but as Trustees under this Declaration of Trust and may contain any further recital which they or he may deem appropriate. And every written obligation, contract or undertaking made or issued by the Trustees, shall provide expressly, in substance or effect, as follows:

"This obligation (contract or undertaking, as the case

may be) is made (or issued) by the undersigned, not individually, but as Trustees under a certain Agreement and Declaration of Trust, and hereby made a part hereof, and is enforcible only against, and is payable only out of, the trust property held thereunder, any and all personal liability of the Trustees and cestuis que trustent thereunder being and having been expressly waived by the holder hereof."

Section 4. The Trustees shall not be liable for errors of judgment in exercising any of their powers or discretions under this Declaration of Trust, nor for any loss arising out of any investment, nor for failure to sue for or to collect any moneys or property belonging to this Trust, nor for any act or any omission to act, performed or omitted by them, in the execution of their powers or discretion, in good faith, and each shall be answerable and accountable only for his own several acts, receipts, neglects and defaults severally and respectively, and not for those of any other, or of any agent employed by them, or of any bank, trust company, broker or auctioneer or other person, with whom, or into whose hands, any trust moneys, property or securities may be deposited or come.

ARTICLE IV.

Any Trustee may acquire, own, hold and dispose of shares of interest in this Trust to the same extent as if he were not a Trustee, without being disqualified to act as Trustee, and while owning and holding such shares on his personal account, as a cestui que trust, shall be entitled to the same rights, privileges and interests as any cestui que trust, and shall be chargeable with no liability because he is both a Trustee and a cestui que trust hereunder. Any trustee, notwithstanding the fiduciary position which he holds, may deal with the Trustees in relation to the Trust Estate as freely as if he were not a Trustee hereunder.

ARTICLE V.

Section 1. No recourse shall at any time be had, under, or upon any note, bond, contract, instrument, certificate, undertaking, obligation, covenant, or agreement issued or executed by the Trustees under or pursuant to the terms of this Declaration of Trust or in managing the Trust Estate or by any agent, representative or employee of the Trustees, or by reason of anything done, or omitted to be done by them or any of them, against the Trustees individually or against any agent, representative or employee, or any cestui que trust, or the holder of any other security issued by the Trustees, either directly or indirectly, by legal or equitable proceeding, or by virtue of any suit or otherwise, except only to compel the proper application or distribution of the Trust Estate, it being expressly understood and agreed that (a) this Declaration of Trust and all obligations and instruments executed thereunder, are executed pursuant thereto by the Trustees; that (b) any acts done or omitted to be done by them are solely the obligations, instruments, acts and omissions of, or in respect of, the Trust Estate, and that (c) all the obligations, instruments, liabilities, covenants and agreements, acts and omissions of the Trustee or Trustees shall be enforced against and be satisfied out of the Trust Estate only, or such part thereof as shall under the terms and provisions of this Declaration of Trust be liable for or chargeable therewith. And all personal and individual liability of the Trustees, or any of them, except as above stated, and of all their agents, representatives and employees, and of the cestuis que trustent are hereby expressly waived and negatived. The Trustees and their agents are not authorized to contract any debt, or do anything which will charge the cestuis que trustent, or bind any or all of them personally.

Section 2. No corporation, trust, association or body politic shall be affected by notice that any of its shares of stock or bonds or other securities are subject to this Trust, or be bound to see to the execution of this Trust or to ascertain or inquire whether any transfer of any such shares, bonds or securities by the Trustees is authorized by this Trust, notwithstanding such authority may be disputed by some other person.

ARTICLE VI.

Section 1. During the continuance of this Trust the beneficial interests therein and thereunder shall be evidenced solely by certificates for shares of beneficial interest, for which provision is hereinafter made.

Section 2. The beneficial interest in this Trust shall be divided into 60,000 beneficial interest shares, 25,000 of which shall be issued forthwith to the following persons named, or to their respective nominee or nominees, in the following proportions, to wit:

Name of Beneficiaries.	Number of Shares of Beneficial Interest.
_____	10,000
_____	5,000
_____	5,000
_____	2,500
_____	2,500

The remainder of said beneficial interest shares may be issued from time to time by the Trustees in such amounts as they may from time to time determine in exchange for additional property conveyed or transferred to them under the trusts hereof or for moneys advanced to or for them for the purposes hereof.

Section 3. As evidence of the ownership of interest shares, the Trustees shall cause to be issued to each cestui que trust a certificate or certificates, which shall be in substantially the following form, to wit:

CERTIFICATE OF BENEFICIAL INTEREST IN——— TRUST.

No..... Beneficial Interest Shares.

(Not Subject to Assessment.)

This certifies that.....is the holder of.....beneficial interest shares in a certain Trust Estate known and designated as The....., created under the terms of an Agreement and Declaration of Trust, dated.....1922 (a duplicate original of which is on file with the Commercial Trust and Savings Bank, of Chicago, Illinois), which is hereby referred to and made a part of this certificate.

All of the provisions of said Agreement and Declaration of Trust are hereby made a part hereof in all respects with the same force and effect and to all intents and purposes as if the same were herein set forth at length, and said interest shares are issued, received and held subject to all such provisions to which the holder by the acceptance hereof consents and agrees. And except only as in said Agreement and Declaration of Trust provided, this certificate confers no rights, privileges or interests.

The owner hereof appearing as such upon the books of the Trustees is entitled to participate in all net income and each distribution of money or other property of the Trust Estate made to the owners of certificates for beneficial interest shares under the terms of said Agreement and Declaration of Trust, in the proportion which the total number of such shares evidenced by this certificate bears to the total number of such shares out-

standing at the date of such distribution. In the event of liquidation of the Trust Estate, such distribution shall be made in the same manner.

This certificate is made by the undersigned, not individually, but as Trustees under said Agreement and Declaration of Trust, and any and all personal liability of the Trustees and the cestuis que trustent under said Agreement and Declaration of Trust is, by the acceptance and as a consideration for the issue and execution hereof, expressly waived and negatived.

The interests represented by this certificate are transferable by the holder in person or by attorney upon the books of said Trustees and not otherwise, and only upon the surrender of this certificate properly endorsed.

IN WITNESS WHEREOF, the Trustees have hereunto signed their names this.....day of.....191...

.....

.....

.....

As Trustees under an Agreement and Declaration of Trust, dated.....1922, creating The.....Trust, and not individually.

On the back of each such certificate shall be endorsed a form of transfer of the beneficial interest shares represented thereby, substantially as follows, to wit:

For value received, I hereby sell, assign, transfer and deliver to.....the beneficial interest shares represented by the within certificate of interest of Trust, and I hereby request that said transfer be recorded on the books of said Trustees.

WITNESS my hand this.....day of....., 191...

.....

In presence of

.....

Section 4. The Trustees may, from time to time distribute to the cestuis que trustent, such income, proceeds or other parts of the Trust Estate as they may determine.

All distributions of income, proceeds or other parts of the Trust Estate, and the amount and conditions of payment thereof, among the cestuis que trustent (except in case of the termination of this Trust) shall rest in the absolute discretion of the Trustees, whose decision with respect thereto shall be final, but in each such distribution the owner (appearing as such on the books of the Trustees) of beneficial interest share or shares hereunder shall be entitled to participate in the proportion which the total number of such shares owned by him bears to the total number of shares then outstanding hereunder. The Trustees may retain, undistributed, such sums as they may deem wise to create a sinking reserve, surplus or contingent fund.

Section 5. In case of the loss or destruction of any certificate of beneficial interest the Trustees may, under such conditions as they may deem proper, issue a new certificate in place of the one so lost or destroyed.

Section 6. Shares of beneficial interest hereunder shall be personal property giving only the rights in this instrument, and in the certificates therefor, specifically set forth.

The ownership of certificates for beneficial interest shares hereunder shall not entitle the cestuis que trustent to any title in or to the trust property whatsoever, or right to call for, demand or secure any partition or division of the same, or for an accounting during the continuance of this Trust and no widow

or widower, heir at law, or devisee, of any shareholder shall have any right of dower or right of homestead or right of inheritance or any other real property right (as distinguished from personal property right) in any of the real estate which is at any time a part of the Trust Estate.

The registered holders of certificates for the time being, and no one else, shall be the cestuis que trustent of the Trust Estate. It is expressly declared that a Trust and not a partnership is created by this instrument, and that the holders of certificates of interest are cestuis que trustent and hold no other relation to the Trustees than that of cestuis que trustent, with only such rights as are conferred upon them as such cestuis que trustent.

Section 7. The death, insolvency, or incapacity of any cestui que trust during the continuance of this Trust, shall not operate to determine this Trust, nor shall it entitle the legal representatives, heirs or assigns, voluntary or involuntary, of such deceased, insolvent or incapacitated cestui que trust, to an accounting or to take any action, at law or in equity, or otherwise, in the courts or elsewhere, against the Trustees; but such legal representatives, heirs or assigns shall succeed only to the rights of such deceased, insolvent or incapacitated cestui que trust, subject to this Declaration of Trust, and any amendments thereto, and shall succeed to nothing more.

Section 8. The Trustees shall have no power to call upon the cestuis que trustent for the payment of any sum of money or assessment whatever other than such sums as they may at any time personally agree to pay by way of subscription to shares of beneficial interests, or otherwise.

Section 9. All transfers of shares of beneficial interest (otherwise than by operation of law) shall be in writing under the hand of the transferror, and upon surrender thereof, with the existing certificate for such shares, to the Trustees, shall be

recorded in the books of the Trustees, and a new certificate therefor shall be issued to the transferee, which new certificate and the rights, interests and privileges of the holder thereof in respect to such new certificate, shall thereupon become subject to this Declaration of Trust. In case of a transfer of only a part of the shares mentioned in any certificate, a new certificate for the residue thereof shall be issued to the transferror. Until the existing certificate shall be so surrendered and transfer recorded, the transferror shall be deemed to be the holder of the share or shares represented thereby for all the purposes of this Trust.

ARTICLE VII.

This Trust shall continue from the date hereof and until the expiration of a term of twenty-one (21) years after the death of the last survivor of the persons whose names are signed hereto, at which time it shall cease.

The Trustees then in office shall wind up its affairs, liquidate its assets and distribute the same, or sell the assets and distribute the proceeds thereof, among the cestuis que trustent according to their respective interests; provided, however, that if prior to the expiration of the said period, two of the Trustees shall vote to terminate this Trust at an earlier date, then in such event, this Trust shall terminate on the date so fixed. For the purpose of winding up their affairs and liquidating this Trust, the then Trustees shall continue in office until such duties have been fully performed.

ARTICLE VIII.

A duplicate original of this Declaration of Trust shall be deposited with the said Commercial Trust and Savings Bank. In the event of the dissolution of the said bank, or the expira-

tion of its charter, the Trustees shall have the power to designate the successor depository. The depository shall deliver to such successor, all documents in its possession relating to the Trust Estate. This Declaration of Trust shall be recorded in such public recording offices as by the Trustees may be deemed necessary or desirable from time to time.

ARTICLE IX.

This Declaration of Trust may at any time or times be amended or altered by the Trustees, in any particular whatsoever, but not so as to extend the duration of the trust or to affect the validity or effect of anything previously done by the Trustees, and except in regard to exemption from personal liability of the Trustees, their agents, representatives and employees or the cestuis que trustent, and in regard to the acquired rights of third persons. In the event any alteration or amendment is made by the Trustees, the same shall be attached to and made a part of this Declaration of Trust, and a copy thereof with the certificate of the Trustees, or a majority of them, as to its adoption shall be filed with the said Commercial Trust and Savings Bank. And such certificate shall be evidence of the adoption of such amendment or alteration for all purposes, and shall be conclusive in favor of purchasers and other persons subsequently dealing with the Trustees.

ARTICLE X.

In the construction of these presents, words in the singular number include the plural number and vice versa and words denoting males include females, and words denoting persons, include firms, associations, trusts and corporations, and the word Trustees shall extend to and include the Trustees for the

time being of these presents, unless a contrary intention is to be inferred from the subject matter or context.

This instrument is executed in five counterparts each of which shall be deemed an original.

IN WITNESS WHEREOF the said ....., ..., ..., ..., and ....., have hereunto set their respective hands and seals in token of their respective acceptance of the Trust hereinbefore mentioned, for themselves and for their successors; and the said....., ..., ..., and ....., Subscribers, have hereunto likewise set their respective hands and seals in token of their respective assents to, and approvals of, the terms of the said Trust, for themselves, and for their assigns, the day and year first above written.

.....(SEAL)
.....(SEAL)
.....(SEAL)
.....(SEAL)
.....(SEAL)

Trustees.

.....(SEAL)
.....(SEAL)
.....(SEAL)
.....(SEAL)

Subscribers.

STATE OF ILLINOIS, }
COUNTY OF COOK, } ss.

I,....., a Notary Public in and for the County and State aforesaid do hereby certify that....., ..., ..., ..., and ....., Trustees, personally known to me to be the same persons whose names are subscribed to the foregoing instrument as such Trustees, appeared before me this day in person and severally acknowledged

that they signed, sealed, and delivered the said instrument as their free and voluntary act and deed, as Trustees as aforesaid, for the uses and purposes therein set forth.

IN WITNESS WHEREOF I have hereunto set my hand and Notarial seal this.....day of.....A. D. 191...

My commission expires.....

.....

Notary Public.

STATE OF ILLINOIS, } ss.
COUNTY OF COOK, }

I, ..., a Notary Public in and for the County and State aforesaid do hereby certify that ....., ..., ... and ....., Subscribers, personally known to me to be the same persons whose names are subscribed to the foregoing instrument as such Subscribers, appeared before me this day in person and severally acknowledged that they signed, sealed, and delivered the said instrument as their free and voluntary act and deed, for the uses and purposes therein set forth.

IN WITNESS WHEREOF, I have hereunto set my hand and Notarial Seal this.....day of.....A. D. 19...

My commission expires.....

.....

Notary Public.

SCHEDULE I.

LANDS IN CASS COUNTY, INDIANA.

All of Section one containing 640 acres. All of Section two containing 640 acres; the north half of northwest quarter ow Section three, containing 160 acres; the West half of southeast quarter and the northeast quarter of Section four, containing 240 acres; the northeast quarter, the north half of southeast quarter and the southeast quarter of southeast quarter of Section ten, containing 290 acres; all of Section eleven, containing 640 acres; all of Section twelve, containing 640 acres; all of Section thirteen, containing 622 acres;

all of Section fourteen, containing 640 acres; the east half, the southeast quarter of the northwest quarter and the southwest quarter of Section fifteen, containing 520 acres; the south half of southeast quarter and the southwest quarter of southwest quarter of Section sixteen, containing 120 acres; the west half of northwest quarter, the west half of southwest quarter and the northeast quarter of southwest quarter of section seventeen, containing 200 acres; the east half of northeast quarter and the east half of southeast quarter of Section nineteen, containing 160 acres; the southwest quarter of northwest quarter and the southwest quarter of Section twenty, containing 200 acres.

SCHEDULE II.

LANDS IN LAKE COUNTY, INDIANA.

The northeast quarter, the Northwest quarter, the southwest quarter and west half of southeast quarter of Section thirteen, containing 559.65 acres, more or less; all of Section fourteen containing 638.88 acres, more or less; all of Section fifteen, containing 640.15 acres, more or less; the west half of southeast quarter and Lots three and two of Section sixteen, containing 233.02 acres, more or less; all of Fractional Section twenty, containing 394.81 acres, more or less; all of Section twenty-one, containing 639.91 acres, more or less; all of Section twenty-two, containing 640.32 acres, more or less; all of Section twenty-three, containing 640.32 acres, more or less; the west half of northeast quarter, and the west half and the southeast quarter of Section twenty-four, containing 561.40 acres, more or less; all of Section twenty-five, containing 637.84 acres, more or less; all of Section twenty-six,

containing 641.43 acres, more or less; all of Section twenty-seven, containing 644.71 acres, more or less.

SCHEDULE III.

LANDS IN BERRIEN COUNTY, MICHIGAN.

East half of southwest quarter, east half of west half of southwest quarter of Section thirty-four, Township thirty-seven South, Range eighteen East, northwest quarter, northwest quarter of northeast quarter, north half of northeast quarter of southwest quarter of Section two, and northeast quarter of Section three, Township thirty-eight South, Range eighteen East.

Southeast quarter of the southeast quarter of Section Three, Township thirty-eight South, Range eighteen East.

Also west half of the southwest quarter of Section two and west half of the southeast quarter of Section three, all in Township thirty-eight South, Range eighteen East. Also Lots one, two, three and four of subdivision of that part of Lot two lying south of North Creek, being fractional southeast quarter of the southeast quarter of Section thirty-three, Township thirty-seven South, Range eighteen East.

Also west three-quarters of the north half of Government Lot number two of Section thirty-three, Township thirty-seven South, Range eighteen East, less three acres off the north end of the west half of the north half of said Government Lot nunmber two, North Creek being the south boundary of the above described premises, together with all riparian rights and water privileges.

SCHEDULE IV.

LANDS IN BENTON COUNTY, MICHIGAN.

The northeast quarter of northeast quarter, south half of northwest quarter of northeast quarter, southwest quarter of northeast quarter, southwest quarter of southeast quarter of northeast quarter, and all of government Lot one, except a strip 463.6 feet wide off the north end of said Lot one, all in Section seven, Township thirty-seven South, Range eighteen East, together with all riparian rights and water privileges thereunto belonging or in anywise appertaining, containing 121.93 acres, more or less;

A strip of land 210.4 feet wide, off the south side of the north half of the northwest quarter of the northeast quarter of Section seven, Township thirty-seven South, Range eighteen East, said strip of land being 1,326 feet in length, containing 6.4 acres, more or less;

Lot number three, of Block number two, of the registered plat of Slayton's subdivision, in Sections seven and eight, Township thirty-seven South, Range eighteen East, as the same is registered in the office of the clerk of the Circuit Court in and for Benton County at Benton Harbor, lying, being and situate in Section seven, Township thirty-seven South, Range eighteen East, containing 4.62 acres, more or less;

Lot A of Block 2 of Slayton's subdivision (being the northwest quarter of the southeast quarter of the northeast quarter) of section seven, Township thirty-seven South, Range eighteen East, containing 10 acres more or less.

Lot number eight on the plat of Harbor View, as said plat appears of record in plat book No. 1, on page 177 of the public records of Benton County, Michigan. Said land being

situated in Section eighteen, Township thirty-seven South, Range eighteen East, containing 1¼ acres, more or less.

SCHEDULE V.

LANDS IN ST. JOSEPH COUNTY, MICHIGAN.

An undivided two-ninths (2/9) interest in the following described lands in St. Joseph County, Michigan:

All of Sections one, two, three, four, five, six, seven and eight, the west half of the northwest quarter, and the west half of the southwest quarter of Section nine; the east half, and the east half of the northwest quarter of Section ten; all of Section eleven; the west half of Section twelve; the north half of Section fourteen; the east half of the northeast quarter of Section fifteen; all of Sections seventeen, eighteen, nineteen and twenty; the west half of the northeast quarter, the northwest quarter and the north half of the southwest quarter of Section twenty-one; the south half of the northeast quarter, and the southeast quarter of Section twenty-two; the southwest quarter of the northeast quarter, the south half of the northwest quarter, the west half of the southeast quarter, the southeast quarter of the southeast quarter, and the southwest quarter of Section twenty-three; the south half of the northeast quarter, the southeast quarter of the northwest quarter, and the southeast quarter of Section twenty-four; the northeast quarter, the southwest quarter of the northwest quarter, the east half of the southeast quarter, and the west half of the southwest quarter, of Section twenty-five; all of Section twenty-six; the east half, the east half of the northwest quarter, the southwest quarter of the northwest quarter, and the southwest quarter of Section twenty-seven; the southeast quarter of the northeast quarter, and the south half of

Section twenty-eight; the southeast quarter of Section twenty-nine; the north half of the northeast quarter, the southwest quarter of the northeast quarter, south 0 degrees 11 minutes east 1,058.6 feet to a brass cap monument; thence north 0 degrees 22 minutes east 1,058.7 feet to the point of beginning, containing 0.124 acres); together with all and singular the tenements, hereditaments and appurtenances hereunto belonging or in anywise appertaining, including all our estate, right, title, and interest therein and thereto both at law and in equity.

SCHEDULE VI.

Certain property and assets of The Wabash Company, Inc., a corporation of the State of Indiana, including book accounts and notes receivable of other corporations and individuals, said notes aggregating in amount the sum of Two Hundred Sixty-two Thousand and Fifty Dollars ($262,050); a certain oil, gas and mineral lease, dated August 1st, 1919, from Joseph K. Ryan on 40 acres of land, being the northeast quarter of the southwest quarter of Section nineteen, Township twenty-one North, Range fourteen West, Carroll County, Indiana; a certain oil, gas and mineral lease, dated August 1st, 1919, from Harry Uhl on 100 acres of land, being the west 100 acres of unleased land in Section sixteen, Township twenty-one North, Range fourteen West, Grant County, Indiana; a certain oil, gas and mineral lease, dated May 10, 1920, from Roy Harmon and others on 80 acres of land, being the east half of the southwest quarter of Section two, Township twenty-one North, Range fifteen West, Grant County, Indiana; a certain oil, gas and mineral lease, dated July 2, 1920, from Walter Bourque on 240 acres of land, being the northwest quarter of Section twelve, and the east half of the

northeast quarter of Section eleven, Township sixteen North, Range ten West, Howard County, Indiana, mineral rights in, and royalty interest on oil produced from, the following described property:

(That certain farm situated in Howard County, Indiana, known as the Landis place, and more particularly described as follows:

All of Section twelve, the north half of Section thirteen, Township thirteen, Range eleven, lying east of old bed of the Wabash River; the west half of northwest quarter, southwest quarter, west half of southeast quarter and southeast quarter of southeast quarter of Section seven, the north half of Section eighteen; the northwest quarter, west half of Section eighteen; the northwest quarter, west half of northeast quarter, northeast quarter, northwest quarter of southeast quarter and Lots one, two and four of Section seventeen; Lot two of Section sixteen; Lots six and seven, Section nine, and Lots six and seven, Section eight, Township thirteen, Range ten, less, however, the right of way of the Logansport and Wabash Valley Road.) subject to all of the liabilities of said The Wabash Company, Inc., as of the 1st day of September, 1918; and a certain oil, gas and mineral lease, dated May 1, 1920, from Thomas J. McGrath and others on 40 acres of land, being the west half of the west half of the northeast quarter of Section twenty-six, Township twenty-one North, Range fifteen West, Logansport, Indiana, subject to the liabilities of said The Wabash Company, Inc., with respect to said lease as of the 10th day of September, 1920.

DOMESTIC PRODUCTS COMPANY.

General Offices:

Chicago, Illinois.

THIS AGREEMENT, made this 22nd day of June, A. D. 1922, between JAMES A. COOPMAN, WILLIAM T. GRABLE and ETHEL S. GRABLE, designated as the subscribers, and JAMES A. COOPMAN, WILLIAM T. GRABLE and ETHEL S. GRABLE, together with their successors, herein designated as the trustees, WITNESSETH, THAT,

WHEREAS, the subscribers are now engaged in a general sales business, and they propose to exchange, deed, transfer, assign and deliver to the trustees herein, under the designation of the DOMESTIC PRODUCTS COMPANY, all contracts, orders, the good will of the established business, and all other kind of assets now belonging to the subscribers in their present established sales organization.

AND it is likewise proposed that for and in consideration of the property aforesaid that the beneficial interests in the present property, and all future property acquired by the trustees, and in the business conducted by them, shall be evidenced and represented herein by thirty (30) common beneficial interests or shares, of the par value of One Hundred ($100.00) Dollars each, said beneficial interest or shares being fully paid and non-assessable.

NOW, THEREFORE, the subscribers, by these presents, do hereby exchange, deed, transfer, assign and deliver to the trustees hereunder, all of the present business, orders, and good will now conducted by the subscribers under the business name of DOMESTIC PRODUCTS COMPANY, to the trustees herein.

AND the subscribers hereby direct and instruct the trustees

herein to issue ten (10) common beneficial interests or shares to each of the trustees herein.

AND now the trustees hereby declare that they will hold said property so transferred and such as may be transferred to them, as well as all other property which may be acquired, together with the proceeds thereof in trust, to manage and dispose of the same for the benefit of the beneficiaries hereunder, and their successors and assigns.

AND the trustees further declare that they will accept the trust and will execute it in the manner hereinabove directed, and subject to the stipulations herein contained, to wit:

FIRST: That whenever the term "Trustees" is used herein, it shall refer to and include the above Trustees, and also any successors in trust, appointed under the terms hereof. That whenever the term "Company" is used herein, it shall be deemed to refer to said DOMESTIC PRODUCTS COMPANY, being the designation, so far as practicable, of the said Board of Trustees and their successors in trust, in their collective capacity, under the terms hereof. That whenever the term "Beneficiary" is used herein, it shall be deemed to mean the owner of beneficial interests in and to the trust estate herein, and that whenever the term "Certificate Holder" is used herein, it shall be deemed to mean the owner of a certificate evidencing one or more beneficial interests, of the par value of One Hundred ($100.00) Dollars each, in and to the Trust Estate herein mentioned, the legal title, ownership and control of which estate is vested in said trustees; and that whenever the term "Certificate" is used herein, it shall be deemed to mean an instrument in writing, or printed or partly written and printed, issued by said Trustees, evidencing the ownership of an equitable interest in said estate of one or more beneficial interests, as may therein be stated.

(B) The trustees, in their collective capacity, shall be des-

ignated, as far as practicable, as the DOMESTIC PRODUCTS COMPANY, and under that name shall, so far as practicable, conduct all business and execute all instruments in writing, in performance of their trust.

SECOND: The Trustees do hereby acknowledge the receipt by them of the property aforementioned, and it is expressly agreed that the said property, as well as any other which may hereafter be acquired by the Trustees for the purpose herein mentioned under the terms hereof, shall be received by the Trustees, and shall be by them held, owned, controlled, managd, and applied to the uses and purposes herein mentioned.

(B) In addition to the present established business, the trustees shall have the right to act as agents for manufacturers, either on salary or a commission basis, in the sales of products of different manufacturers, and they shall have the right to do any and all things necessary to accomplish the purpose herein set forth, the same as natural persons might or could do, and in any part of the world, as principals, agent, contractors, trustees or otherwise, and either alone or in company with others.

(C) That money or property, together with the income and issues thereof received or acquired by the said trustees under the terms hereof, shall constitute and be held, kept and used by them as a Trust Estate, for the use and benefit of the beneficiaries in the said estate, and that the said trustees are authorized, empowered and directed to apply the said money or property or the proceeds, the increase or income thereof, constituting said Trust Estate, as their discretion dictates, to the best interest of the beneficiaries hereunder.

THIRD: The trustees hereunder shall be three in number, and the said trustees herein mentioned shall hold their office until the annual meeting, or until their successors have been elected and have accepted their trust.

(B) The trustees shall, at every annual meeting or adjournment thereof, elect a full Board of Trustees to serve for the next ensuing year, said annual meeting to be on the first Tuesday in July, following the first Monday in July, each year, commencing in 1922.

FOURTH: The trustees are authorized to employ all necessary or proper agents, servants, brokers, attorneys, employees or counsel, to carry into effect the purpose of the trust herein contained, and to protect and preserve the same, and to provide and pay out of said Trust Estate, the compensation, fees, commissions, or expenses incurred in the management thereof, and to vote salaries to themselves. To contract for and on behalf of said trust estate, and to bind the same and its property to the performance of such contracts; to borrow money on behalf of such trust estate on such terms and conditions as said trustees shall deem best, and to bind said estate and its assets to the payment of such indebtedness and to pledge and incumber any property of said estate, whether real, personal or mixed, for the security of the indebtedness so incurred, under such terms and conditions as to the trustees may seem best, and to agree upon, approve and fix, execute and deliver in the name and on behalf of the said trust estate, any deed, pledge, mortgage, bond, note endorsement or guarantee, trust deed, or any other instrument which may be necessary or proper to carry out the terms of this instrument. But neither the said trustees nor the said certificate holders or beneficiaries nor any of them shall be in any manner personally liable by virtue of any contract, note, bond, deed of trust, mortgage or other instrument executed under the terms of this paragraph, but the same shall fully bind the property of the said trust estate for the performance thereof.

(B) It is expressly understood that all expenses incurred

by said trustee in carrying out the terms hereof, as well as all liabilities incurred by them in the execution of said trust, whether arising from contract or tort, shall be considered as expenses of executing said trust, which shall first be paid out of the assets and properties thereof, and which shall be a first and prior lien against the said estate and property, superior to all others.

(C) The said trustees shall, in their own name, as trustees of said estate, bring any suit or action which in their judgment shall be necessary or proper to protect said estate or to enforce any contract made for the benefit thereof, and to defend in their discretion any suit or action against said estate or against the trustees thereof. The said trustees are expressly authorized to bring or defend such suit in their discretion or to compromise and settle any suit, claim or controversy in which the said estate is interested, as to them may seem best, and to discharge the same out of said estate and its assets; and they are specially authorized to pay or transfer out of said estate and its assets, all sums of money or property necessary to discharge any judgment against them in their said capacity as trustees, together with all court costs, or other costs, including counsel and attorney's fees and also to pay out of said estate or its assets, such sums of money, or transfer or appropriate property thereof, for the purpose of settling, compromising, or adjusting any such claim or controversy, together with any such costs and expenses connected therewith, and all of such expenditures shall be treated as expenses of executing this trust.

(D) The trustees shall have full power to invest and reinvest the trust estate, its profits, income, increase, surplus or avails, subject to the terms of this instrument. But the trustees shall not delegate to any agent or attorney in fact, the power to contract on behalf of said estate, or bind it to the payment of

money, but when said trustees have agreed upon the terms and forms of any contract or contracts, or other instrument or instruments necessary or proper for the carrying out of the purposes herein mentioned, and the execution of the trust hereby created, they may, by resolution or other written authority, designating and describing the form of such contract or contracts or instrument, authorize an agent or agents, attorney or attorneys in fact, to countersign and deliver, in the name and on behalf of said trustees, any such contract or instrument, but in no case shall such agents or attorneys be authorized to countersign or deliver any notes, bonds, bill of sale, mortgages, trust deeds, encumbrances, or pledges transferring, binding, encumbering or alienating the property of said trust estate, whether real, personal or mixed.

(E) The trustees shall hold the legal title to all property at any time belonging to their trust and shall have and exercise the exclusive management and control of the same, and the right of the said trustees to manage, control and administer the said trust estate shall be absolute and unconditional, free from the control or management of the beneficiaries.

(F) So far as strangers to this trust are concerned. a resolution of the trustees authorizing a particular act to be done shall be conclusive evidence in favor of such strangers that such act is within the powers of said trustees, and no purchaser from the trustees or one loaning money to the trustees shall be bound to see to the application of the purchase money or loaned money or other consideration paid or delivered by or for said purchaser or loaner to or for said trustees.

FIFTH: Stated meetings of the trustees shall be held at least once every three months, and other meetings shall be held from time to time, upon the call of any officer or trustee. A majority of the Board of Trustees shall constitute a quorum,

and the concurrence of all the trustees shall not be necessary to the validity of any action done by them, but the wish of the majority of the trustees present and voting at any meeting shall be conclusive. It shall be necessary for a majority of the trustees to concur in all writings and transactions of every kind or character, as the only means of executing this trust and validating its acts. A majority of the trustees may amend this trust, but vested rights shall not be impaired; they may adopt and use a common seal; they may make, adopt, amend or repeal such by-laws, rules, and regulations, not inconsistent with the terms of this instrument, as they may deem necessary for the conduct of their business or for the government of themselves, their agents or representatives.

SIXTH: The trustees may elect officers, who shall have the authority and perform such duties as the trustees may determine. They may combine the duties of several officers in one person. Two of such officers, elected, at least, shall be from among their own members. The trustees shall have authority to elect or appoint temporary officers to serve during the absence or disability of regular officers; to fix the compensation of any or all officers, agents or employees they may appoint, and are likewise authorized to pay themselves such compensation for their services as they may deem reasonable.

(B) The trustees shall cause to be kept by a Secretary elected by them, a record of all meetings of the beneficiaries and of the trustees, which record shall be similar in character and of the effect as that kept in case of corporations, and so far as strangers to this trust are concerned, shall be conclusive against the trustees of the facts and doings therein stated.

(C) Any trustee may acquire, own and dispose of beneficial interests in this trust, to the same extent as if he were not

a trustee hereof, and any trustee may be removed for just and proper cause.

(D) In case of death, resignation or removal of any trustee, the remaining members of the Board of Trustees shall have the power and authority to elect trustees to fill the unexpired term or vacancy thus created, and for that purpose, a majority of the remaining trustees shall be sufficient to elect one or more trustees as above stated, and such trustees, as above elected, shall occupy the same relation to this trust as if they were original parties to this instrument. In case of death, resignation or disqualification of the entire Board of Trustees, a new Board may be appointed for the unexpired term by a Court of Equity of competent jurisdiction.

(E) Neither the said certificate holders, nor the owners of beneficial interests, or any of them, or their property shall be liable for any indebtedness or liability created by, growing out of, or arising from the execution of the said trust estate, whether arising from contract or tort of the said trustees, their servants, agents or employees, in the administration of said estate. The trustees, personally, nor either of them, nor their private property, whether real, personal or mixed, shall be in any manner, liable for any debt or liability incurred by said trustees, or any of them, in the administration or management of the said estate, whether arising from contract or tort of the said trustees or any of them, or their agents, servants, or employees; and neither said trustees or either of them shall ever be held personally liable for any damage or injury to person or property caused by or arising from, incident to, or growing out of the execution of said trust; nor shall they be liable for the acts or omissions of each other. That the assets of the said trust estate only, shall be liable for any indebtedness, liability, wrong, injury or tort incurred, arising out of or growing out

of, the administration of the said trust estate by the said trustees or any of them or for any act or negligence or default of their servants, agents, or employees in the administration of said estate.

(F) The said trustees shall use ordinary and reasonable diligence in the performance of this trust, but shall not be liable to the beneficiaries or any of them, for any act, default, failure or negligence in or connected with the execution of the said trust, provided, the same shall not amount to and constitute fraud, embezzlement or wilful breach of trust, and they shall not be obliged to give bond to secure the due performance of this trust by them.

SEVENTH: For the sole purpose of designating the interests of the present and future beneficiaries hereunder, and their legal representatives and assigns, the beneficial interests herein shall be divided into thirty (30) common beneficial interests or shares, of the par value of One Hundred ($100.00) Dollars each, and the said trustees may execute and deliver to each such beneficiary hereunder, a certificate signed by the officers designated for that purpose, which shall evidence and set forth how many interests or shares of the par value of One Hundred ($100.00) Dollars each, the said beneficiary is entitled to hereunder; and the certificates issued by the trustees to said beneficiaries shall be substantially in the following form, to wit:

CERTIFICATE.

Number..... .....Shares

DOMESTIC PRODUCTS COMPANY.
CAPITALIZATION 30 SHARES.
General Offices:
Chicago, Illinois.

This certifies that.....is the holder of..... shares in the capital of DOMESTIC PRODUCTS COMPANY, fully paid and non-assessable, subject to Declaration of Trust in

favor of said organization, dated June 22nd, 1922, and recorded in Cook County, Illinois, and transferable only on the books of this organization, in person or by attorney, upon surrender of this certificate properly endorsed.

IN WITNESS WHEREOF, the said organization has caused this certificate to be signed by its duly authorized officers, and its seal to be hereunto affixed this.....day of..... A. D. 19...

.....
President.

.....
Secretary.

Shares $100.00 each.

(B) By a unanimous vote of all the trustees at any annual meeting, or special meeting called for that purpose, the trustees shall have the power to issue preferred beneficial interests of said trust state, to such an amount from time to time as they shall deem expedient for the interest and advancement of the trust estate herein created, and such preferred beneficial interests may be sold for cash, exchanged for property, or distributed as dividends, at the option of the trustees.

(C) In case of the loss or destruction of any certificate of beneficial interests issued hereunder, the trustees may, under such terms as they may deem expedient, issue new certificates in place of the ones lost or destroyed.

(D) The trustees may from time to time declare and pay such dividends as are earned by all outstanding beneficial interests, out of the net earnings from time to time received by them, as they may deem advisable; but the amount of such dividends and the payment of them, shall be wholly in the discretion of the trustees, and the surplus profits or earnings shall not be maintained as separate fund, but shall be merged into the body of the trust property.

(E) The trustees shall keep a record book of the benefi-

ciaries, and the number of beneficial interests owned by each of them, and beneficial interests hereunder shall be transferable only on the books of the trustees, and this may be done by bill of sale, or upon surrender of certificates therefor and presentation of a written transfer thereof. The acceptance of a certificate of beneficial interests by the original holder or transferee, shall make the person named in said transfer a party of this instrument, as if such party had, in person, joined in the execution thereof.

(F) The name in which a beneficial interest stands on the books of the trustees, shall be considered by the trustees conclusive evidence of ownership, and they shall not be required upon transferring such beneficial interests or paying dividends on such interests, or distributing assets upon the termination of the trust, or at any other time, to inquire in any way into the relations between assignor and assigns, pledgor or pledgee, trustee and beneficiary, guardian and ward, or in any other similar relation, and shall have the right to conclusively presume without inquiry, that the beneficiary, as shown by their books, is the real and true and unconditional owner thereof.

EIGHTH: Annual meetings for the election of trustees and for the transaction of other business shall be on the first Tuesday in July, following the first Monday in July, each year, commencing in 1922, of which meeting the secretary or acting secretary shall give notice by mail to each trustee at his registered address, at least ten days before such meeting, but failure to give notice of such meeting shall not invalidate the proceedings of the meeting.

(B) The trustees may call the beneficiaries together at the annual meeting of said trustees, upon ten days' notice given as aforesaid, at which meeting the trustees may submit an annual, or such other reports as they may deem advisable, to said bene-

ficiaries for their information, and the beneficiaries, at such annual meeting, may nominate from among themselves, candidates for the office of trustees, presenting such nominations to the Board of Trustees, but the election of such nominees, by the trustees, shall be wholly optional with said trustees. The fiscal year shall end each year on December 31st.

NINTH: The death of a beneficiary or of a trustee during the continuance of this trust, shall not operate to terminate the trust, nor shall it entitle the legal representative of the deceased certificate holder to an accounting, or to take any action in the courts, or elsewhere, against the trustees; but the executors, administrators or assigns of any deceased certificate holder shall succeed to the rights of said decedent under this trust, upon surrender for transfer, of the certificates for the interests held by him.

(B) It is expressly agreed that the said trust shall not be terminated or the administration thereof in any wise interfered with or suspended by the death of any such beneficiary, or his incapacity for any reason, or by his said interest or interests being by process of law subjected to the payment of debts, or in any way vested in any heir, assign, creditor, or purchaser, of the said beneficiary, or in any trustee, assignee or officer of any court, or by the same in any manner being divested out of the beneficiary and transferred or vested in any other person, administrator, executor, trustee, assignee, or personal representative. But any such person who may, in any such manner acquire or become vested with the ownership of such certificate, shall thereupon succeed to and become entitled to all the rights and equities of the beneficiary therein named, and the beneficial interests in the said trust estate, upon surrendering the original certificate to the said trustee with such proof of ownership as may be reasonable required by them, and the issue in lieu

thereof of a new certificate, and notwithstanding said change of ownership or interest in any such certificate, or death or insolvency of the original owner thereof, the said trust estate shall continue and remain in full force until terminated as herein provided.

TENTH: The trustees hereunder shall, in entering into contracts and in the execution of notes, bonds, or other written instruments obligatory upon the said estate, set forth in appropriate terms that the said instruments are not entered into by them nor binding upon them individually, but only as trustees of this estate, and that contracts or obligations are to be satisfied or performed out of the assets of said trust estate only. But the failure or neglect of such trustee or trustees to so declare in any instrument, contract or obligation entered into for the purpose of carrying out the objects of said trust, shall not be construed to render said trustees or any of them, individually liable thereon, but the same shall be obligations binding upon and performable only out of the assets of said trust estate.

(B) It is further expressly agreed that the said Trustees are fully authorized in their capacity as such and for and on behalf of said trust, to receive, collect, receipt and give full releases, acquittances and discharges for any sums of money which may be payable to them as said trustees, for the benefit of said trust, or for any property or any other thing of value which they may be entitled to receive on behalf of said trust.

ELEVENTH: This trust shall not continue in any event longer than for the term of twenty-one years after the death of the trustees named herein, at which time the then Board of Trustees shall proceed to wind up its affairs, liquidate its assets, and distribute the same among the certificate holders of the beneficial interests, according to the number of interests held by them.

(B) For the purpose of winding up their affairs and liquidating the assets of the trust, the then Board of Trustees shall continue in office until such duties have been performed.

IN WITNESS WHEREOF, the said JAMES A. COOPMAN, WILLIAM T. GRABLE and ETHEL S. GRABLE, Trustees, hereinbefore mentioned, have set their hands and seals in token of their acceptance of the trust herein specified, for themselves and their successors; and the said JAMES A. COOPMAN, WILLIAM T. GRABLE and ETHEL S. GRABLE, Subscribers, have hereunto set their hands and seals, in token of their assent to and approval of said terms of trust for themselves and their assigns, the day and year first above written.

.....
.....
.....
Subscribers.
.....Trustee (SEAL)
.....Trustee (SEAL)
.....Trustee (SEAL)

STATE OF ILLINOIS, }
COUNTY OF COOK, } ss.

I, ..., a Notary Public in and for said County aforesaid, do hereby certify that WILLIAM T. GRABLE, ETHEL S. GRABLE, and JAMES A. COOPMAN, personally known to me to be the same persons whose names are subscribed to the foregoing instrument, appeared before me this day in person, and acknowledged that they signed, sealed and delivered the said instrument, as their free and voluntary act, for the uses and purposes therein set forth.

GIVEN under my hand and official seal this 14th day of July, A. D. 1922.

.....
Notary Public.

CHICAGO RAILWAY TRUST.

Chicago City and Connecting Railways Collateral Trust was adjudicated in the case of Venner v. Chicago City Ry. Co., 258 Ill. 523; 101 N. E. 949. A copy of the Trust Agreement is as follows:

Trust Agreement as Amended November 7, 1910, and June 12, 1911.

Dated January 1, 1910.

Trust Agreement, made and entered into at Chicago, Illinois, dated the first day of January, in the year one thousand nine hundred and ten, between

Cobe & McKinnon, a co-partnership composed of Ira M. Cobe and John W. McKinnon, of the city of Chicago, state of Illinois, hereinafter called the "Vendors," parties of the first part, and

Elbert H. Gary, of the city of New York, state of New York, and Albert J. Earling, and Samuel M. Felton, of the city of Chicago, state of Illinois, hereinafter called "Trustees," jointly, parties of the second part:

Whereas, the Vendors are the owners or holders, possessing the right to sell and assign, and to transfer and deliver, certain mortgage bonds and shares of capital stock of corporations owning or operating electric railways in the city of Chicago and vicinity, hereinafter more particularly specified; and

Whereas, the Vendors propose to sell and assign, and to transfer and deliver the said bonds and stock to the Trustees upon the trusts set forth in this trust agreement in consideration of the acceptance of such trusts by the Trustees, and of the issue and delivery by the Trustees to the Vendors of

certain five per cent. bonds and of certificates of certain preferred participation shares and of certain common participation shares, all as hereinafter more particularly described; and

Whereas, the trust hereby created is to be entitled and designated "Chicago City and Connecting Railways Collateral Trust:"

Now, therefore this indenture witnesseth that in consideration of the premises and of the mutual covenants and agreements herein contained and the expected performance thereof, and of the sum of one dollar by them duly received from the Trustees, and for the purpose of creating such Chicago City and Connecting Railway Collateral Trust;

The Vendors have sold, assigned, transferred and set over, and by these presents do sell, assign, transfer and set over, unto

The trustees, parties of the second part hereto, the survivors and survivor of them and their successors, as joint tenants and not as tenants in common:

I. All and singular the following shares of stock of the several corporations, and of the aggregate par value, specified respectively the certificates of which several shares of stock are herewith delivered to the Trustees to wit:

Shares.		
169,719	Chicago City Railway Company (an Illinois corporation)	$16,971,900
50,000	Calumet and South Chicago Railway Company (an Illinois corporation)	5,000,000
8,000	Southern Street Railway Company (an Illinois corporation)	800,000
10,000	Hammond, Whiting and East Chicago	

	Railway Company (an Indiana corporation)	1,000,000
720	Chicago and Western Railway Company (an Illinois corporation)	72,000
		$23,843,900

II. Also, all and singular the following mortgage bonds of the several corporations, and of the aggregate par values, specified respectively, which bonds herewith are delivered to the Trustees, to wit:

	Par Value
Calumet and South Chicago Railway Company (Consolidated Mortgage)	$5,000,000
Hammond, Whiting and East Chicago Railway Company (First Mortgage)	1,000,000
Southern Street Railway Company (First Mortgage)	1,600,000
Chicago and Western Railway Company (First Mortgage)	74,000
	$7,674,000

And it is understood and agreed that in case the Vendors shall not deliver to the Trustees the full amount of the bonds in the foregoing clause II scheduled as being transferred to the Trustees, the Vendors shall have the right to deliver in lieu of any such bonds and to cover any such shortage, cash for each such bond equal to the par value thereof; which case from time to time thereafter shall be repaid to the Vendors in corresponding amounts upon their delivery to the Trustees of the bonds in lieu of which such cash deposit shall have been made.

Pending the engraving of the certificates of any stock or

of any bonds constituting any part of the above described securities, or any securities at any time exchanged or substituted therefor or any part thereof, the Vendors may deliver to the Trustees, printed certificates or printed bonds, substantially in the form proposed for the permanent certificates of stock or bonds. Without unnecessary delay, the Vendors will cause to be prepared engraved certificates of stock and bonds to be exchanged for said printed certificates of stock and bonds:

To have and to hold, unto the Trustees, the survivors and survivor of them, and their successors, as joint tenants and not as tenants in common, all and singular, the said shares of capital stock and the said bonds, and any and all shares of stock, bonds or other property for which the said shares of stock or said bonds, or any of them, at any time may be exchanged, or which at any time may be received by the Trustees as the holders of such shares of capital stock or such bonds, and also any and all moneys or other personal property resulting therefrom which pursuant to the provisions hereof shall come into the hands of the Trustees as part of the trust estate—all of which personal property hereinafter sometimes is termed the "trust fund"—with all the rights and powers of stockholders or bondholders or owners of such stock or bonds or personal property, and, as hereinafter provided, with full power of sale or other disposition of all or any part thereof, for and during the lives of the following named eight persons—to wit, James B. Forgan, John J. Mitchell, E. K. Boisot, Harrison B. Riley, John A. Spoor, Edward Morris, Samuel Insull and Ira M. Cobe—and the life of the last survivor of said persons, and for and during the period of twenty years next ensuing after the death of such survivor unless such sooner shall be determined.

But in trust, nevertheless, to hold and dispose of the said trust fund, and to collect and receive the proceeds and income thereof and to apply and use the said trust fund, proceeds and income, as in this trust agreement provided, first, for the payment of the principal and interest from time to time of the said five per cent bonds, and thereafter for the benefit of the two several classes of holders of participation shares, viz. (1) the holders from time to time of the preferred participation shares, and (2) the holders from time to time of the common participation shares—according to the interests and rights and the limitations thereof, severally and respectively, of each of such two classes, collectively, relatively to the others, but without preference, priority or distinction of any holder of any class over any other holder of the same class, but in every case according to the covenants and provisions, and subject to the conditions and limitations in this trust agreement contained and expressed, that is to say:

ARTICLE ONE.

Section 1. The Trustees, in their collective capacity may be designated as the "Chicago City and Connecting Railways Collateral Trust," and in that name any business of the trust may be conducted, and any instruments of writing connected with the trust or its performance may be executed by the Trustees "as Trustees under the Trust Agreement dated January 1, 1910, creating the Chicago City and Connecting Railways Collateral Trust, and not individually."

Section 2. The Committee from time to time constituted under the provisions of this trust agreement or such of their number as may be empowered to act in behalf of the Committee, hereinafter called the "Committee," shall possess and

may exercise the powers and authorities of the Committee hereinafter set forth; and any and all such acts or proceedings in respect of the trust fund or the respective interests therein, from time to time done or taken by the Committee, shall bind accordingly the holder at the time being of each and every participation share, and the heirs, executors, administrators, successors and assigns of such holder, as fully as if each such holder had expressly authorized and assented to each such act or proceeding in the premises.

Section 3. The trustees shall have power to perform any act and to execute and deliver any instrument in writing in the premises which they may be instructed to perform or to execute and deliver by the Committee, acting in exercise of the police powers and authority upon it conferred as hereinafter expressed.

Section 4. The beneficial interest in the trust fund and in the proceeds of the trust fund, and in the income and net income of the trust fund (the several terms, "proceeds of the trust fund," "income of the trust fund," and "net income of the trust fund," being hereinafter in this article defined) shall be, and during the continuance of this trust shall remain (subject to the prior obligation of the outstanding five per cent bonds to be secured by the collateral trust indenture, dated January 3, 1910, mentioned hereinafter), in the holders of the outstanding preferred participation shares and in the holders of the outstanding common participation shares, severally and respectively, according to the relative interests, preferences and rights, and the limitations thereof, set forth and provided in this trust agreement, or expressed or referred to, respectively, in the certificates of such preferred participation shares, or in the certificates of such common participation shares.

Section 5. For the purpose of payment of the principal of the interest of the five per cent bonds secured by the collateral trust indenture, dated January 3, 1910, the "proceeds of the trust fund" and "income of the trust fund" shall be deemed to be and shall be the amounts from time to time ascertained as provided in the collateral trust indenture securing said bonds.

Section 6. For the purpose of making payments upon the participation shares, "the net income of the trust fund" for each fiscal year ending December 31, shall be deemed to be the sum which shall have been ascertained by deducting from the gross income however derived for such fisal year received from said trust fund, by the Trustees the following prior charges—all of which shall be paid, or provision for the payment thereof shall be made, before any payments on the participation shares—to wit: (1) All expenses and losses incurred in connection with the conduct or administration of the trust in such fiscal year, including, as part of such expenses, the compensation of the Trustees, their agents and employees, the compensation and re-imbursement for expenses of the trustee and the sinking fund trustee under the collateral trust indenture, dated January 3, 1910, the compensation of the Committee, and their agents and employees, general expenses, and all other expenses and losses, including the indemnification of the Trustees and the Committee against any liability by them incurred in the discharge of their duties under the several trusts herein expressed; (2) all the sums paid or reserved for taxes and assessments, ordinary and extraordinary, for such fiscal year upon the property constituting the trust fund, or the interest therein of the trustee under the collateral trust indenture, dated January 3, 1910, or the interest therein of the holders of any of the bonds

issued under such collateral trust indenture; (3) all sums paid or reserved for interest for such fiscal year on bonds which shall have been issued and shall be outstanding under the said collateral trust indenture, dated January 3, 1910; (4) all sums paid or reserved on account of the installments for such fiscal year of the sinking fund payment provided for in said collateral trust indenture dated January 3, 1910; (5) interest on all bills payable and other indebtedness payable out of the trust fund—all of such foregoing payments and expenses being chargeable upon and being payable out of the principal of the trust fund to the extent that the income thereof shall be insufficient to defray the same—and (6) an annual sum not exceeding $100,000 to be fixed pursuant to the provisions of Section 2 or Article Four of this trust agreement.

Such "net income," determined as aforesaid, from time to time shall be ascertained and be declared by the Committee, and for all the purposes of this indenture, and of every certificate issued thereunder, the amount thereof as so ascertained and declared, shall be deemed and be taken to be "the net income of the trust fund" of the Chicago City and Connecting Railways Collateral Trust, and the Trustees shall be authorized to rely thereupon, and shall not be bound to verify the same or to make any examination with reference thereto.

ARTICLE TWO.

Section 1. Forthwith upon the execution and delivery of this trust agreement, the Trustees will enter into a collateral trust indenture, with First Trust and Savings Bank, of the city of Chicago, state of Illinois, substantially in the form of the instrument in writing hereto annexed, marked "Schedule",

and, as part of the same transaction, will assign, transfer and deliver to, and pledge with, said First Trust and Savings Bank all and singular the stocks and bonds scheduled in the paragraphs numbered I and II of the assigning clause of this trust agreement, or the cash thereunder substituted for any of said bonds, to have and to hold the same unto the said First Trust and Savings Bank, its successor and successors and assigns, forever, but in trust to secure and to provide for the payment of certain bonds (herein sometimes termed five per cent bonds), payable January 1, 1927, and bearing interest at the rate of five per cent per annum, and being in the form and of the tenor and effect set forth in said collateral trust indenture, for an aggregate principal sum not exceeding $22,000,000, at any one time outstanding, which bonds are to be signed by or on behalf of the Trustees under this trust agreement, and are to be authenticated by the trustee under said collateral trust indenture, and are to be issued and delivered, received and transferred, subject to the covenants, conditions and provisions set forth and contained in said collateral trust indenture and in this indenture. All of the provisions of said proposed collateral trust indenture, hereby are made a part of this trust agreement so far as concerns the rights of the holders of said bonds as in this trust agreement declared and so far as concerns the rights, interests, privileges and immunities of such bondholders and of the trustee under said collateral trust indenture.

Section 2. Upon the execution of said collateral trust indenture dated January 3, 1910, the Trustees hereunder shall sign, or shall cause to be signed in their behalf, five per cent bonds, in the form authorized to be issued under said collateral trust indenture, for the aggregate principal sum of $22,000,000, and shall deliver the same to the trustee under

said collateral trust indenture for certification by it. As provided in said collateral trust indenture, the trustee thereunder shall be authorized to redeliver any and all such bonds, when so certified, to or upon the order of the Trustees, and in no event shall it be bound further to see to the application of any such bonds or their proceeds. Such bonds for the aggregate principal sum of $21,440,000 upon such certification, from time to time shall be deliverable upon the order of the Vendors. The remaining $556,000 of bonds shall be delivered to the Trustees, or upon their order, and shall be sold by the Trustees at and for the price of ninety per cent of the par value, plus accrued interest to the date of sale, and from time to time the proceeds thereof shall be used and applied as shall be directed by the Committee.

Section 3. The said bonds as herein and in said collateral trust indenture provided, as to both principal and interest, shall be payable only out of the principal or proceeds and the income of the property from time to time held by the trustees under said collateral trust indenture, and no personal liability on the part of the Trustees, or of any person interested, beneficially or otherwise, in the trust fund, shall arise out of or be enforcible because of the making, issuing or transfer of said bonds, or any thereof.

Section 4. The holders from time to time of the said five per cent bonds and the interest obligations appertaining thereto to the extent of the principal and interest thereby represented shall have the right, as provided in said collateral trust indenture, through the trustee thereunder or otherwise, to enforce the performance of the covenants contained in said bonds or in the collateral trust indenture securing the same out of and against the said trust fund but not otherwise .and the interests therein of any of the beneficiaries hereinafter desig-

nated, but not against the Trustees or any beneficiary, individually.

ARTICLE THREE.

Section 1. Subject to the prior obligations of the five per cent bonds as in Article Two of this trust agreement expressed, and subject to the right of the Trustees to apply, or the right of the Committee to direct the application by the Trustees of, any part or all of the income or proceeds of the trust fund, or any part of the trust fund consisting of cash, to or for the uses or purposes expressed in Section 2, of Article Four of this trust agreement, and subject also to the prior payment of the several charges above mentioned in Section 6 of Article One, the sole beneficial interest in the trust fund and in the net income and proceeds thereof, shall be and during the continuance of this trust shall remain in the owners from time to time of transferable shares of beneficial interest.

In the first instance, the ownership of all of such shares of beneficial interest, shall be in the Vendors, and the certificates of such shares, to be issued by the Trustees as hereinafter provided, shall be in the name of and shall be delivered to, the Vendors or their nominees.

Section 2. Such shares of beneficial interest (hereinafter called "participation shares") shall be two classes, to wit, preferred participation shares and common participation shares.

The number of the preferred participation shares shall be two hundred and fifty thousand.

The number of the common participation shares shall be one hundred and fifty thousand, and also such additional number as from time to time may be authorized as in Section 4 of this article provided.

For convenience, the income payments on such participation shares are herein termed "dividends."

The relative rights and interests, and the limitations thereof, of the holders of the preferred participation shares and of the holders of the common participation shares, shall be as follows:

The holders of the preferred participation shares shall be entitled to receive, out of the net income (as the term "net income" is defined in this trust agreement) applicable to such purpose, theretofore received by and then under the control of the Trustees, from the bonds, stocks and other securities from time to time constituting the trust fund subject to this trust agreement, dividends at the rate of $4.50 per annum on each such share, payable in semi-annual installments on the first day of January and the first day of July in each year. Such dividends shall be cumulative, and the moneys therefor shall be paid or shall be set apart for payment before any dividend on the common participation shares shall be paid or set apart; so that if in any year dividends amounting to $4.50 shall not have been paid upon any preferred participation shares, the deficiency shall be paid before any dividend shall be paid upon or be set apart for the common participation shares.

Whenever in any year after all such cumulative dividends in respect of the preferred participation shares for all previous years shall have been paid, and the semi-annual instalments for the current year shall have been paid or set apart for payment, any such applicable net income shall remain in the possession and under the control of the Trustees, such remaining applicable net income to such amount or amounts as the Committee may direct or approve, but not in any such year exceeding $600,000, shall be distributed and be paid, as

a non-cumulative dividend ratably among and to the holders of the common participation shares.

Whenever in any year, after the sum of $600,000 shall have been so divided among, and shall have been paid or the amount thereof shall have been set apart for payment, ratably on the common participation shares, any of such applicable net income shall remain in the possession and under the control of the trustees, such remaining applicable net income to such amount or amounts as the Committee shall direct or approve but not in any such year exceeding $1,000,000, shall be distributed and paid, as a non-cumulative additional dividend to and among the holders of the participation shares; both preferred and common, in the following proportions, to wit: Five-eighths of any such residuary sum ratably among and to the holders of the preferred participation shares, and three-eighths thereof ratably among and to the holders of the common participation shares.

In every year in which such last mentioned non-cumulative dividend therein of $1,000,000 shall have been paid as aforesaid, or the amount thereof set aside for payment as aforesaid, the holders of the common participation shares shall be entitled ratably to receive out of any and all further applicable net income remaining in such year, such amount or amounts as from time to time the Committee may direct or approve.

Upon any distribution by the undersigned Trustees of the stocks, bonds or other securities constituting the trust fund, or the proceeds thereof, in accordance with the terms of this trust agreement, before any amount shall be paid to the holders of the common participation shares, the holders of the preferred participation shares shall be entitled to receive in respect of every such share the sum of $100 and also the amount of any accrued and unpaid, and the accrued propor-

tion of the currently accruing, semi-annual installment of the $4.50 cumulative dividend, and after such amounts shall have been paid to the holders of the preferred participation shares and not otherwise, the remainder of such trust fund, or the net proceeds thereof (after the payment of all charges thereon or in respect thereof) shall be distributed and be paid to the holders of the common participation shares ratably according to their respective interests.

The registered holders of the preferred participation shares shall have the same ratable right (if any) as the holders of the common participation shares to subscribe for and to take additional common participation shares in case of any future increases in the number thereof and if the opportunity to subscribe therefor shall be offered to the holders of participation shares.

Section 3. The Trustees shall issue certificates of such preferred participation shares and such common participation shares which certificates, respectively, shall be in substantially the following form (the blanks therein being appropriately filled), to wit:

(Form of Preferred Participation Certificate.)

No..... .....shares.

Chicago City and Connecting Railways Collateral Trust.

Trustee's Certificate of Preferred Participation.

The undersigned, as Trustees under a trust agreement dated January 1, 1910, creating the trust called Chicago City and Connecting Railways Collateral Trust, do hereby certify that.....is the owner of.....preferred participation shares of the beneficial interest specifically described in said trust agreement.

The holders of the preferred participation shares shall be entitled to receive, out of the net income (as the term "net

income" is defined in said trust agreement) applicable to such purpose, theretofore received by and then under the control of the undersigned Trustees from the bonds, stocks and other securities from time to time constituting the trust fund subject to said trust agreement, dividends at the rate of $4.50 per annum on each such share, payable in semiannual installments on the first day of January and the first day of July in each year. Such dividends shall be cumulative, and the moneys therefor shall be paid or shall be set apart for payment before any dividend on the common participation shares shall be paid or shall be set apart for payment before any dividend on the common participation shares shall be paid or be set apart; so that if in any year preferential dividends amounting to $4.50 shall not have been paid upon any preferred participation shares, the deficiency shall be paid before any dividend shall be paid upon or set apart for the common participation shares; and as stated in said trust agreement, the holders of such preferred participation shares shall be entitled also to preference upon any distribution of the trust fund or the proceeds thereof.

Under the provisions of said trust agreement, the holders of certificates of participation shares registered as in said trust agreement required, will be entitled to exercise certain voting powers, limited relatively as between the preferred participation shares and the common participation shares, as well as in other respects; and they shall possess also certain other dividend rights, all as specified in the said trust agreement.

All the provisions of said trust agreement are hereby made a part hereof, in all respects and with like effect as though the same were herein set forth at length; and except only as in said trust agreement mentioned and provided, this certifi-

cate confers no rights, powers, privileges or interest.

The participation shares represented by this certificate are transferable only upon the books of the Trustees, in person or by attorney, upon surrender of this certificate. This certificate shall not become or be valid until countersigned by the Registrar of Transfers.

In testimony whereof, the Trustees have signed this certificate by their agent duly authorized this.....day of.....

.....,
.....,
.....,

As Trustees under the Trust Agreement Dated January 1, 1910 Creating the Chicago City and Connecting Railways Collateral Trust, and Not Individually.

By.....,
Their Agent duly authorized.

(Form of Common Participation Certificate.)

No..... .....Shares.

Chicago City and Connecting Railways Collateral Trust.

Trustees' Certificate of Common Participation.

The undersigned, as Trustees under a trust agreement dated January 1, 1910, creating the trust called Chicago City and Connecting Railways Collateral Trust, do hereby certify that .....is the owner of.....common participation shares of the beneficial interest specifically described in said trust agreement.

The rights of the holders of common participation shares are subject to the prior rights of the holders of the preferred participation shares, as set forth in said trust agreement.

The number of the common participation shares may be in-

creased in the manner, and subject to the provisions, set forth in the said trust agreement.

Under the provisions of said trust agreement, the holders of certificates of participation shares registered as in said trust agreement required, will be entitled to exercise certain voting powers, limited relatively as between the two classes as well as in other respects, all as specified in the said trust agreement.

All the provisions of said trust agreement are hereby made a part hereof, in all respects and with like effect as though the same were herein set forth at length; and except only as in said trust agreement mentioned and provided, this certificate confers no rights, powers, privileges or interest.

The participation shares represented by this certificate are transferable only upon the books of the Trustees, in person or by attorney, upon surrender of this certificate. This certificate shall not become or be valid until countersigned by the Registrar of Transfers.

In testimony whereof, the Trustees have signed this certificate by their agent duly authorized this.....day of.....

.....,

.....,

.....,

As Trustees under the Trust Agreement Dated January 1, 1910, Creating the Chicago City and Connecting Railways Collateral Trust, and not individually,

By.....,

Their Agent duly authorized.

Each of such certificates, in the appropriate blanks therefor, respectively, shall recite the name of the holder, and the number of participation shares represented by such certificate.

No certificate shall be issued to represent less than one whole participation share of either class.

Such certificates may be signed by the Trustees, or in their behalf by their agent authorized as provided in section 2 of Article Five of this trust agreement. From time to time, the committee may direct that such certificates shall bear also the counter signature of the secretary of the Committee.

The persons or corporations who from time to time shall be Trustees or Trustee under this trust agreement, either in their or its own name as such Trustees or Trustee, or in the names of the said parties of the first part may cause to be signed, and may issue any and all certificates of participation shares which theretofore shall not have been signed by or in behalf of the parties of the first part.

On the back of each such certificate shall be endorsed a form of transfer of the participation shares represented thereby, substantially as follows:

For value received, ...hereby sell, assign and transfer.....participation shares represented by the within Certificate to....., subject to the terms and conditions of the trust agreement within referred to, and to all rules concerning such transfer which have been, or from time to time, or at any time, may be established by the within named Trustees; to which trust agreement and rules, the transferee and every holder hereof does assent by the acceptance of this transfer; and do appoint.....attorney to transfer said certificate on the books of said Trustees accordingly, with full power of substitution in the premises.

Dated this.....day of.....19...

.....(SEAL)

In the presence of

....., Witness.

Section 4. From time to time, and at any time during the continuance of the trust, the registered holders of a majority

of the total number of common participation shares, either by a writing signed by them and duly acknowledged or proved in the manner provided by law in respect of the execution of deeds of real property to be recorded in the state of Illinois, or by vote at a meeting of the holders of participation shares held as in this trust agreement provided, may authorize the Trustees to increase the number of the common participation shares in the amount specified in such writing or in such vote, and accordingly to issue certificates thereof in substantially the same form as the certificates of the common participation shares then outstanding. Such writing or such vote also may specify the terms and the consideration on and for which the Trustees may sell or otherwise may dispose of such additional shares, and in the absence of any such specification the Trustees may sell or otherwise may dispose of such additional shares on such terms and for such consideration as may be stated and fixed by the Committee, and without offering to the holders of participation shares the opportunity of subscribing for such additional shares. Any and all action taken by the Trustees pursuant to the provisions of this section shall bind the holders of each and every of the participation shares, as though all of them had expressly assented thereto.

Section 5. The Trustees shall keep, or shall cause to be kept in the city of Chicago, state of Illinois, or in the city of New York, state of New York, or in each of said cities, transfer books in which shall be registered the names of the several holders of the participation certificates, together with the post-office address of each as given by him for such purpose. Such participation certificates shall be transferable only on such books of the Trustees, to be kept by them or under their direction in the city of Chicago, state of Illinois, or in the city of New York, state of New York, upon due execution of a transfer

substantially in the form endorsed on the back of such certificates, and on surrender thereof, by the registered holder in person or by attorney duly authorized, and in accordance and upon compliance with such rules and requirements as from time to time or at any time the Trustees may establish or promulgate. Until so transferred, the Trustees and all other persons may treat the registered holders as the owners of said participation certificates for all purposes whatsoever, and none of them shall be affected by any notice to the contrary.

The said transfer books may be directed to be closed by the Trustees and accordingly the same shall be closed at and during any period prior to the date of any dividend or distribution upon the participation shares, or prior to the date of any meeting of the holders of the participation shares. The Trustees shall close the transfer books also at any time and for such period as the Committee shall request.

Section 6. All certificates before issue, shall be registered by a trust company of the city of Chicago from time to time designated in writing, by the Trustees, as the register of transfers, and such registration shall be noted on the certificates. The Trustees may appoint also a trust company in the city of New York as the registrar of transfers and such registration shall be noted on the certificates. No such participation certificates, unless so registered by the registrar of transfers in Chicago, or the registrar of transfers in New York, shall be of any validity or shall be entitled to share in the benefits of this trust agreement.

The Trustees from time to time, may appoint one or more transfer agents in Chicago, and one or more transfer agents in the city of New York. The registrar of transfers in Chicago may act also as transfer agent in New York. The registrar of

transfers in New York may act also as transfer agent in Chicago.

The Trustees, by an instrument in writing, signed by them, from time to time and at any time may appoint another trust company in Chicago or in New York to act as registrar of transfers in Chicago, or New York, respectively, in place of the registrar of transfers theretofore appointed, and may appoint successors to the transfer agent, or agents, in Chicago, or New York, theretofore appointed.

Section 7. Pending the preparation of the engraved certificates to be issued under this trust agreement, the Trustees may issue and deliver printed certificates substantially in the form of the definitive certificates hereinbefore recited, and each of said printed certificates shall be marked "Temporary."

Such temporary certificates shall be registered by the registrar or transferred in the same manner as herein provided in respect of the engraved certificates.

Such temporary certificates duly issued and registered hereunder from time to time, shall be exchangeable, at the office or agency of the Trustees in the City of Chicago, without expense to the holder, for engraved certificates. Such temporary certificates, until engraved certificates are prepared for delivery, shall be transferable in the same manner as the certificates.

Without unnecessary delay the Trustees will cause to be prepared such engraved certificates, to be exchanged for such temporary certificates, upon surrender thereof to the Trustees.

Section 8. In case any certificate shall become mutilated, or shall be lost or destroyed, the Trustees, on evidence satisfactory to them that it has been mutilated, lost or destroyed and on such terms if any as to indemnity and otherwise as the Trustees shall deem proper, may issue a new certificate in the name of the registered holder of such former certificate.

Section 9. Every transfer (otherwise than by operation of law) of any certificate and the said participation shares represented thereby shall be in writing (substantially in the form hereinbefore recited) under the hand of the registered holder, and upon delivery of such writing together with the existing certificate to the Trustees or their transfer agent, such transfer shall be recorded on the transfer books, and a new certificate for such shares so transferred shall be given to the transferrer, and in case of a transfer of a part only of the shares represented by the certificate, a new certificate for the untransferred shares shall be given to the transferrer. Until the transfer shall be so delivered and recorded, the registered holder of a certificate shall be deemed to be the holder of the participation shares thereby represented for all the purposes of the trusts hereof and neither the Trustees nor the Committee shall be affected by any notice of any unrecorded transfer.

Section 10. Whenever in consequence of the death, bankruptcy or insolvency of the holder of any certificate, or in any way other than by a transfer in accordance with the preceding Section 9, any person shall become entitled to any certificate, and shall produce proper evidence of his title and shall surrender such certificate to the Trustees or their transfer agent, he shall be registered in the transfer books as the holder of the shares represented by such surrendered certificate and shall receive a new certificate for the same.

Section 11. Certificates and the interests thereby represented shall be personal property and the certificates shall entitle the holders thereof only to the rights and interests in the trust fund as set forth in this trust agreement.

Section 12. Two or more persons holding any certificate shall be joint tenants of the entire interests represented thereby and no entry shall be made in any certificate or in the transfer

books that any person is entitled to any future limited or contingent interest in any certificate. But subject to the provisions hereinafer contained, any person registered as the holder of any certificate may be described therein as a trustee of any kind, and words may be added to the description to identify the trust.

Section 13. The Trustees shall not, nor shall the Committee or any transfer agent or other agent of the Trustees or the Committee, or the holder of any certificate, be bound to take notice of any trust whether express, implied or constructive, or of any charge or equity concerning any certificate or the interest in the trust fund of the holder of any certificate. Except as noted in the certificate or in the transfer book, neither shall they be bound to ascertain or inquire as to the authority for any sale or transfer of any such certificate or interest by any registered certificate holder or his personal representatives, or to recognize any person as having any interest therein except the persons registered as such certificate holders. The receipt or voucher of the person in whose name any certificate is registered, or if such certificate be registered in the names of more than one person, the receipt or voucher of any one of such persons, shall be a sufficient discharge for all dividends and other money payable in respect of such certificate and from all responsibility in respect of the application thereof.

Section 14. Unless express notice to the contrary shall have been received by the Trustees, they may deem and may treat any person who shall present a participation certificate, together with a transfer thereof signed by the registered holder of such certificate, as the bona fide owner of such certificate, and accordingly on demand they may transfer the shares thereby represented.

ARTICLE FOUR.

Section 1. Subject to the paramount rights of the First Trust and Savings Bank or its successor, as trustee under the collateral trust indenture securing the five per cent bonds, and of the holders of such bonds under the provisions of said indenture as creditors, the Trustees shall receive all interest, dividends or income of the trust fund; and, first, after the ascertainment and determination of "the income of the trust fund" as provided in the collateral trust indenture securing the five per cent bonds, from time to time shall apply such income to the payment of the interest on said bonds, as and when the same shall become due and payable, and to the payment of the annual sinking fund installment as and when required to be paid by said collateral trust indenture; and, next, after the ascertainment and determination of the amount of "the net income of the trust fund" as provided in Section 6 of Article One of this trust agreement, and after the making of the several payments, provisions and reservations specified in said Section 6 of Article One, from time to time shall apply such "net income of the trust fund" to the payment of the sums distributable to the holders of the participation shares according to the relative rights and limitation of rights of the two classes of such shares, as herein specified.

Section 2. So far as lawfully may be done, in any year, after payment of the interest due on the five per cent bonds, and the sinking fund installment for the then current year, the Trustees may, and upon the request of the Committee, the Trustees shall, set apart out of the "net income of the trust fund," as and for a "surplus fund," such sums if any, not to exceed $100,000 in any one fiscal year, as the Committee may direct. Such "surplus fund," shall be applied and be used by the

Trustees, from time to time upon the direction or approval of the Committee, in such way and for such purposes (which may include the payment of the cumulative semi-annual dividends of $2.25 per share on the preferred participation shares), as the Committee shall deem advisable.

Out of the proceeds of any or all of the $556,000 of five per cent bonds hereinabove authorized to be sold by the Trustees, the Trustees shall pay all expenses connected with the organization of this trust, including the preparation of all writings or instruments incident thereto, the preparing, engraving, issuance and certification of the five per cent bonds and the certificates of preferred shares and common shares herein provided for, and they may add the balance remaining to the aforesaid "surplus fund."

From time to time upon the request of the Committee the Trustees shall pay to the Committee or its order, out of any funds in the hands of the Trustees available for that purpose, such sums or amounts as the Committee shall in writing request for use by the Committee in payment and discharge of expenses, obligations and liabilities incurred by or on behalf of the Committee in the administration of this trust.

Anything in this trust agreement to the contrary notwithstanding all income of the trust fund shall be distributed in accordance with the provisions of this indenture on or before January 1, 1931.

Section 3. In the event that any bond constituting part of the trust fund shall be paid or be redeemed, or in the event that the property of any of the corporations, whose capital stock, or any part thereof, at any time shall constitute any part of the trust fund, shall be sold, and the proceeds thereof distributed to the holders of the capital stock of such corporation, and as a result thereof any moneys shall come into the hands

of the Trustees, or in the event that any of the capital or the principal represented by any of the trust fund securities or any part thereof shall be distributed or be paid over to the Trustees—then, in any such event, any amount or amounts so received or distributed or paid over shall be applied by the Trustees, first to the prepayment or redemption of the five per cent gold bonds, or otherwise, in accordance with the provisions of the collateral trust indenture, securing such bonds; and (subject to the reservations above stated in section 6 of Article One of this trust agreement); second, ratably to and among the holders of preferred participation shares then outstanding until the sum of $100 shall have been paid with respect to each of the said preferred shares, together with any accrued and unpaid semi-annual cumulative dividends of $2.25 per share and the proportionate amount then accrued of such dividend then currently accruing; and third, ratably to and among the holders of common participation shares.

Section 4. Whenever the full amount payable upon any preferred participation shares as specified in the preceding section 3 of this article shall have been paid, or the amount thereof shall have been set aside for payment when and as called for by the holders of such shares, then and thereupon all interest of the then present or any future holders of such shares, or of any certificate thereof, in the trust fund, or in any income realized therefrom, forthwith shall cease and determine, and the certificate representing every such share shall be surrendered to the Trustees, and shall be cancelled and not reissued.

Section 5. In case any sums amounting to less than $100 on account of principal or capital shall have been paid upon any preferred participation share, or shall have been set aside for payment thereon upon the order of the holder thereof (no such payment, however, to be made except upon production of the

certificate, in order that the amount of any such payment may be stamped thereon), the amount to which the holder of such certificate thereafter shall be entitled, with respect to each of said shares represented by such certificate, either on account of dividends or principal, shall be reduced in the proportion that the aggregate amount of all such payments on account of capital or principal shall bear to $100.

Section 6. Nothing in this trust agreement or in any participation certificate issued hereunder, either expressed therein or to be implied therefrom, is intended or shall be construed to give to any person or corporation other than the parties hereto, the trustee under the collateral trust indenture securing the five per cent bonds, the holders of such bonds, and the holders of participation certificates issued under this trust agreement and registered as herein provided, any legal or equitable right, remedy or claim under or in respect of this trust agreement, or any covenant, condition or provision herein contained, or any right, title, or interest in or to any property herein described or subject to the provisions hereof; all the covenants, provisions and conditions of this trust agreement and of said participation certificates being intended to be, and being, for the sole and exclusive benefit of the parties to this trust agreement and the several other persons in this section mentioned.

Section 7. Subject to the provisions of the indenture securing the five per cent bonds, the Trustees shall have the right to vote upon any and all shares of stock constituting any part of the trust fund, at any and all meetings, regular or special, of the corporation or corporations issuing such stocks; and, subject to the terms and provisions of this trust agreement, the Trustees may take any action or may give or execute any consent or may take any step which the owners of such stock would be entitled or authorized to take, give or execute, with

the same force and effect as though at the time the Trustees were the absolute owners of such stock; and from time to time the Trustees may give proxies to any person or persons to vote such stock; but in voting upon any of such stock the Trustees shall follow the directions or instructions, if any, that may be given to the Trustees by the committee, and shall cause their proxies also to follow such directions or instructions.

In voting or in causing to be voted any such stock, the Trustees (and Committee when giving any such written directions or instructions to the Trustees), from time to time will exercise their best judgment to elect suitable directors of the corporation issuing such stock, to the end that the affairs of such corporation shall be properly managed. In voting and in acting on any other matters which shall come before the Trustees as stockholders, or at stockholders' meetings, the Trustees (and the Committee when giving any such written directions or instructions to the Trustees), likewise will exercise their best judgment. Nevertheless, the Trustees assume no personal responsibility, and shall be under no personal obligation in respect of such management or in respect of any action by them taken or taken in pursuance of their consent thereto as such stockholders or in pursuance of their votes cast.

Section 8. Any income of the trust over and above the income derived from the stocks, bonds, or other securities held by the trustee under the collateral trust indenture securing the five per cent bonds, shall be applied and be used by the Trustees, in such manner as the Committee shall request, not in disregard of any express provision of this agreement.

Section 9. In case the Trustees shall acquire any interest in real estate, as proceeds or income of the deposited securities, they shall hold the same, subject to the terms of this trust agreement, for sale or other conversion into personal property; and,

at all times, all such real estate shall be considered and be treated as personal property for the purposes of this trust.

Section 10. Any of the Trustees may purchase, acquire and own any of the five per cent bonds or any of the participation shares free from accountability with respect thereto, and may deal therein in all respects the same as any other person, either with any holder of such bonds or with any holder of such participation shares, or with any other person.

Section 11. At any time prior to the happening of the event hereinbefore fixed for the termination of this trust, upon the written request of a majority of the members of the Committee and of the trustee under the collateral trust indenture securing the five per cent bonds, or of such majority and of the trustee under any instrument securing any bonds issued to pay off said five per cent bonds as hereinafter provided, the Trustees shall terminate this trust, and shall sell and dispose of the trust fund, upon such terms as shall be approved by the Committee and such trustee; provided, always, however, that, in event of any such termination of this trust, the trust fund never shall be so sold or disposed of except on such terms as after payment of all prior costs, charges and expenses, will produce cash sufficient to pay at par the principal and interest of all said five per cent bonds at the time outstanding, or of all of the then outstanding bonds issued for the purpose of paying off said five per cent bonds as hereinafter provided. In the event of any such sale or disposition of the trust fund, the net proceeds shall be applied by the Trustees, first, to the prepayment at par of the then outstanding five per cent bonds, or of any then outstanding bonds issued to pay off said bonds, in accordance with the indenture securing the bonds, so paid; and (subject to the reservations above specified in section 6 of Article One of this trust agreement), second, ratably to and

among the holders of preferred participation shares, then outstanding, until (including any previous payments) the sum of $100 shall have been paid with respect to each of the said shares, together with accrued and unpaid semi-annual cumulative dividends of $2.25 per share and the proportionate amount then accrued of such dividend then currently accruing; and third, ratably to and among the holders of the common participation shares. In case said trust fund shall be so sold and disposed of partly for cash (sufficient in amount to pay the principal and interest of said bonds as hereinbefore provided), and partly for securities or other property, the Committee (1) shall place a valuation upon such securities or property, and in case such valuation shall be approved in writing by every Trustee, such securities and other property shall be distributed in kind to the holders of the participation shares as hereinbefore provided; but otherwise such securities and other property shall be sold at public auction and the proceeds thereof shall be distributed to the holders of said participation shares as aforesaid. Any valuation so made by the Committee with the approval of the Trustees and any sale so made by the Trustees shall be conclusive upon all persons interested in the trust fund. At any such sale at public auction, any Trustee, or any member of the Committee, without further accountability (except for the purchase price) may bid for and purchase any property so sold.

If, pursuant to the provisions of the ordinance of the city of Chicago in respect of the Chicago City Railway Company, passed February 11, 1907 the city of Chicago or its authorized licensee shall purchase the property of the Chicago City Railway Company, the Trustees shall terminate this trust, and thereupon shall sell and dispose of the residue of the trust fund upon such terms as shall be approved by the Committee. In

event of such termination of this trust, the net proceeds of the trust fund shall be applied, first (a) in case of such purchase under the terms of said ordinance by the city of Chicago, to the prepayment at par and interest of the then outstanding five per cent bonds, or (b) in case of such purchase under the terms of said ordinance by the authorized licensee of the city of Chicago, to the prepayment of said five per cent bonds, then outstanding at par and a premium of five per cent, together with interest, all in accordance with the indenture securing the bonds so paid; and, in either case (subject to the reservations above specified in section 6 of Article One of this trust agreement), second, ratably to and among the holders of preferred participation shares, then outstanding, until (including any previous payments) the sum of $100 shall have been paid with respect to each of the said shares, together with accrued and unpaid semiannual cumulative dividends of $2.25 per share and the proportionate amount then accrued of such dividends then currently accruing; and third, ratably to and among the holders of the common participation shares.

Section 12. With the written consent or approval of a majority of the members of the Committee, and on such terms and conditions as the Committee shall approve, the Trustees shall have power to mortgage or to pledge all or any part of the trust fund for the purpose of borrowing money (repayable from the trust fund and not otherwise) to pay the principal and interest of any of said five per cent bonds at their maturity by lapse of time or otherwise; provided, however, that no money shall be borrowed otherwise than in conformity with the conditions and limitations expressed in subdivision (k) of section 16 of this article.

Section 13. With the direction or approval of the Committee (and the indenture securing the five per cent bonds

shall so provide), the Trustees, may withdraw any of the trust fund securities from the lien of the indenture securing the said bonds, by paying to the trustees under such indenture in cash, for each share of the capital stock of the Chicago City Railway Company, the sum of $200 per share, and for each of the other trust fund securities so withdrawn, the par value thereof, and for the purpose of withdrawing any of such securities, the Trustees may use any funds in their hands; but the Trustees shall not in this manner withdraw any one class or kind of such securities to an amount exceeding ten per cent of such class or kind of securities subject to this trust agreement, except that as herein provided, bonds may be converted into stock and canceled. The Trustees, as directed or authorized by the Committee, shall hold or shall sell and dispose of such securities, so withdrawn.

At any time after so withdrawing any of such trust fund securities, the Trustees may reassign and deliver the same to the trustee under the said collateral trust indenture securing the five per cent bonds, and thereupon they shall be entitled to demand and to receive the money paid to the said trustee at the time of the withdrawal of such securities so reassigned and delivered.

Section 14. In the event that the Trustees shall not deliver to the trustee under the indenture securing the five per cent bonds, the full amount of the securities in the assigning clause of this trust agreement scheduled as being transferred to the Trustees, the Trustees shall have the right to deposit with the said trustee, in lieu of any such securities, and to cover any such shortage, cash for each share of the capital stock of the Chicago City Railway Company at the rate of $200 a share and for any of the other securities the par value thereof; which cash from time to time thereafter may be withdrawn

by them in corresponding amounts upon delivering to the trustee under such indenture the securities in lieu of which such cash deposit shall have been made.

Section 15. With the consent or approval of the Committee, and of the holders of a majority of all the participation shares, including a majority of the preferred participation shares, the Trustees shall have power to sell, or to exchange for shares of stock or other securities or for part cash and part securities and other property, any of the trust fund securities; subject, however, to the lien of the indenture securing the five per cent bonds, or any other bonds issued for the purpose of paying off said bonds. Said sale, exchange, or other disposition of said securities, or of any part thereof, however, shall be subject to the lien of said indenture, and otherwise may be upon such terms and conditions as shall be approved by the Committee and the holders of the specified proportion of the participation shares, respectively.

Section 16. Subject to any rights of the trustee of the said collateral trust indenture dated January 3, 1910, as specified therein, and subject to the terms of the written approval or consent of the Committee in any case where under the terms of this trust agreement such approval or consent is authorized or required, the Trustees shall have power:

(a) To deposit any moneys derived from the trust fund, with any trust company, or in any bank;

(b) To loan any moneys under control of the Trustees available for such purpose, on such terms, and with or without security, and to such persons or companies as the Committee shall approve;

(c) To buy, or to join with any person or persons in buying, any property that shall be sold under the provisons of any mortgage or security in which property or any part

thereof the Trustees shall have an interest, because of some right under this trust agreement, and to allow the title to any property so bought to be taken in the name or names of such person or persons, and to be held by such person or persons as the Committee shall approve;

(d) To transfer to any person or persons any share or shares, in any company or association, the securities of which or any part thereof, shall constitute part of the trust fund, as hereinbefore provided, and to allow any such share or shares to stand in the name or names of such person or persons, as the Committee shall approve, in order to qualify such person or persons as a director or directors, or as an officer or officers of such company, or otherwise, or for the purpose of maintaining the organization of such company;

(e) To collect and to sue for, and to receive and to receipt for, all sums of money due the Trustees; to compound, compromise, and to abandon or to adjust by arbitration, or otherwise, any actions, suits, proceedings, disputes, claims, demands and things relating to said trust fund; and to transfer to and deposit with any trust company or other persons, any shares or securities forming part of the trust fund, for the purpose of any arrangement for enforcing or protecting the rights and interests of the trustees or of the holders of the bonds or participation shares hereinbefore provided for; and to give time, with or without security, for the payment or delivery of any debts or property claimed by the Trustees, or belonging to said trust fund; and to pay or satisfy any claims against the trustees or the said trust property;

(f) To invest at any time, and from time to time, any sum or sums which the Trustees may hold, available for investment, in any securities or property which the Committee may approve and with like approval to sell or other-

wise to dispose of any such investments and reinvest the proceeds thereof, or any part thereof and so to continue to invest and to reinvest during the period of this trust;

(g) To permit to be sold or leased to, or merged or consolidated with each other, any corporations or companies any of whose shares, bonds or securities constitute part of the trust fund;

(h) To vote in person or by proxy upon all shares or other securities whatsoever, belonging to this trust;

(i) To vote upon any of the shares, constituting any part of the deposited securities, in favor of any lawful consolidation, merger, or reorganization or the properties, franchises or shares of any of the companies whose shares or part thereof shall constitute part of said trust fund, with the properties, franchises and shares of any other company, upon such terms and conditions as shall be approved by both the Committee and the trustee under the indenture securing the five per cent bonds or of any bonds issued to pay off said bonds; and with like approval and authority, as to terms and conditions, to vote any of said shares to authorize a lease or operating agreement between the companies or any of them, whose shares or part thereof shall constitute any part of the trust fund, and any other company with which such lease or operating agreement may lawfully be made;

(j) To pay any and all taxes or liens of whatsoever nature or kind, imposed upon or against the said trust fund, or any part thereof, out of any proper funds available for such purpose; and

(k) To borrow money, when and in such amount or amounts and upon such terms and for such purposes as the Committee may approve, and as such Trustees, to execute and to deliver, but subject to the provisions of sections 9

and 10 of Article Five, such notes, bonds or other evidences of indebtedness, payable only out of the trust fund, in such form and containing such terms and conditions, as the Committee may approve; and as security therefor, on such terms and conditions as the Committee may approve, to mortgage or pledge, any property or securities held by said Trustees under this trust agreement.

Every obligation made or issued by the Trustees shall provide expressly in substance or effect as follows:

"This obligation is issued by the undersigned not individually, but as Trustees, under a certain Trust Agreement, dated January 1, 1910, hereby made part hereof, and is payable only from the trust fund therein mentioned, any and all personal liability of the Trustees, Committee, bondholders and certificate holders thereunder being and having been expressly waived by the holder hereof."

The five per cent bonds and the appurtenant coupons, substantially in the form recited in the said collateral trust indenture dated January 3, 1910, are hereby expressly authorized.

(l) To enter into such contracts of guaranty as shall be approved by the Committee, the obligations arising thereunder to be payable only out of the trust fund held by the Trustees. Said contracts shall be restricted, however, to the guaranty of dividends, rentals, bonds and other obligations, payable by companies, the stock of which, or not less than a majority of the stock of which, shall be owned by the Trustees, and to the guaranty of obligations secured by stock or bonds of companies whose stock, or not less than a majority of whose stock, shall be owned by the Trustees. Every such contract or obligation shall provide expressly or in substance as follows:

"This obligation is issued by the undersigned, not individually, but as Trustees under a certain Trust Agreement dated January 1, 1910, as amended on the 7th day of November, 1910, hereby made part hereof, and is payable only from and out of the trust fund therein mentioned, but subject to the prior rights of the First Trust and Savings Bank, of Chicago, Illinois, as trustees under the indenture dated January 3, 1910, and of the present and future holders of the bonds issued thereunder, any and all personal liability hereunder of the Trustees, Committee, bondholders and certificate holders under said Trust Agreement or indenture being and having been expressly waived by the holders hereof. A copy of said Trust Agreement and said indenture is on file with the First Trust and Savings Bank of Chicago."

No debt, obligation or liability of any kind shall be created, or incurred by any one other than the Trustees or otherwise than in the manner in this trust agreement provided.

No member of the Committee and no certificate holder shall be authorized to impose any debt or obligation or liability of any kind upon the trust fund, or upon the Trustees or any of them, or upon the Committee or any member thereof, or upon any certificate holder or holders, or upon the holder or holders of any bond or obligation made or incurred by the Trustees.

Anything in this trust agreement to the contrary notwithstanding, no distribution of the principal of the trust fund, or of any part thereof, or of the proceeds thereof, shall be made to or among the certificate holders or any of them, until any and all outstanding debts, obligations or liabilities of the Trustees, payable out of the trust fund or any part thereof, shall have been paid or discharged or satisfied, or provision satisfactory to the Trustees shall have been made

for the payment or discharge or satisfaction thereof.

Each and every obligation and each and every certificate of participation shares issued by the Trustees under this trust agreement after the 7th day of November, 1910, shall after the names of the Trustees at the foot thereof, contain the following recital:

"As Trustees under the trust agreement dated January 1, 1910, creating the Chicago City and Connecting Railways Collateral Trust (as amended November 7, 1910), and not individually."

Provided, however, that any and all of the five per cent bonds of the Trustees issued or issuable under the Indenture dated January 3, 1910, shall be executed by the Trustees in the form recited in said indenture. (This paragraph (1) of section 16 of Article Four hereof added by amendment made November 7, 1910).

(m) To enter into such contract or contracts, as shall be approved by the Committee, for purchasing or acquiring, or procuring the right to purchase or acquire, securities, or any part thereof, issued or to be issued in accordance with any present or future plan providing for the merger or consolidation of the elevated railroads of the city of Chicago, and contemplating a merger or consolidation of such consolidated elevated railroads with the surface street railways of the city of Chicago, the obligations arising thereunder to be payable only out of the trust fund held by the trustees. Every such contract shall provide expressly or in substance, as follows:

"This obligation is issued by the undersigned, not individually, but as Trustees under a certain Trust Agreement, dated January 1, 1910, as amended November 7, 1910, and as amended June 12, 1911, hereby made part hereof, and is payable only from and out of the trust fund therein mentioned,

but subject to the prior rights of the First Trust and Savings Bank of Chicago, Illinois, as trustee under the indenture dated January 3, 1910, and of the present and future holders of bonds issued thereunder, any and all personal liability hereunder of the Trustees, Committee, Bondholders and Certificate Holders under said Trust Agreement or indenture being and having been expressly waived by the holder hereof. A copy of said Trust Agreement and said indenture is on file with the First Trust and Savings Bank of Chicago."

Each and every obligation and each and every certificate of participation shares issued by the Trustees under this Trust Agreement after the 12th day of June, 1911, shall, after the names of the Trustees at the foot thereof, contain the following recital:

"As Trustees under the Trust Agreement dated January 1, 1910, creating the Chicago City and Connecting Railways Collateral Trust (as amended November 7, 1910, and as amended June 12, 1911), and not individually."

Provided, however, that any and all of the five per cent bonds of the Trustees issued or issuable under the indenture dated January 3, 1910, shall be executed by the Trustees in the form recited in said indenture. (This paragraph (m) of section 16 of Article Four hereof added by amendment made June 12, 1911.)

Sec. 17. Subject to the provisions of the collateral trust indenture, and as far as lawful at any time and from time to time, with the written consent of the Committee, the Trustees may, and upon the written request of the Committee, they shall convert or cause to be converted into shares of the capital stock of the corporations issuing the same, all of the bonds of any of the several issues of bonds transferable in paragraph II of the assigning clause of the trust agreement.

Such bonds severally and respectively shall be converted into shares of capital stock as herein provided only (a) if the shares issued upon such conversion shall be of an aggregate par value equal to the aggregate principal sum of the bonds converted; (b) if all of the bonds of each such issue shall be converted as an entirety; (c) if the corporation converting such bonds shall have no other outstanding bonds of any issue (or, in case of the Calumet & South Chicago Railway Company, no outstanding bonds of any issue other than bonds of the issue underlying the consolidated mortgage bonds of such company scheduled in said paragraph II of the assigning clause of this trust agreement); (d) if all of the stock (excepting directors' qualifying shares) of such corporation making such conversion, then shall be held by the trustees under the indenture securing the five per cent bonds; and (e) if the capital stock of the corporation making such conversion, equal at par to the aggregate principal sum of the bonds thereinto converted, shall be deposited with the said trustee, subject to no lien prior or superior to the lien of said indenture securing the five per cent bonds.

In every case, the capital stock of the corporation issued upon any such conversion, shall be issued as fully paid and non-assessable. Such capital stock may be either common stock or preferred stock, or part common stock and part preferred stock; but in any case, all of the capital stock (other than directors' qualifying shares) of such corporation, whether theretofore issued or then issued, shall be held by the trustee under said indenture securing the five per cent bonds.

Any and all such stock issued in conversion of bonds ipso facto shall become and shall be subject to this trust agreement and to all the terms and provisions thereof, and forthwith, upon the issue thereof, shall constitute part of the trust

fund, and shall be delivered to the trustee under the indenture securing the five per cent bonds, as part of the securities pledged thereunder, free from any prior lien.

ARTICLE FIVE.

Section 1. The Trustees shall receive out of the trust fund or the income thereof, for their services such remuneration as from time to time shall be fixed by the Committee, and reimbursement for their reasonable expenses and disbursements, and prior indemnity against all losses and liabilities by them incurred in the discharge of their duties hereunder.

Sec. 2. Except as otherwise herein provided, the action of a majority of the Trustees taken from time to time at a meeting, or by writing with or without a meeting, shall constitute the action of the Trustees and have the same effect as though assented to by all. When any Trustee, being a natural person, shall be absent from the United States, and shall have been so absent for more than seven (7) days, or, in the judgment of the Committee shall be unable to act or incapable of acting as such Trustee, the other Trustees or Trustee, for the time being, may exercise all the powers and authority given to the Trustees. Any Trustee so absent or contemplating such an absence may, by power of attorney or otherwise, empower any other Trustee or Trustees to act on his behalf, during his absence, and to exercise any power, discretionary or otherwise, and to use his name in the execution or signing of documents as such Trustee, for the purposes of said trust.

Sec. 3. Any trustee may retire and may be discharged from these trusts by presenting his resignation in writing at a meeting of the Committee or of certificate holders, or by

delivering the same to any member of the Committee, but such resignation shall be effectual and complete only upon the expiration of three (3) calendar months thereafter, or upon the previous acceptance of such resignation by the Committee, or the appointment of a new Trustee or Trustees in his place, and meanwhile, he shall continue as such Trustee.

Sec. 4. At any time and from time to time, the Committee shall have power to increase or to reduce the number of Trustees under this trust agreement (but in the case of natural persons, not to a number of less than two); and without assigning any reason therefor to remove or discharge any Trustee from such trust. Whenever any Trustee shall die, or shall be or shall desire to be, discharged from said trust, or shall resign, the Committee shall have power to appoint in his place, a new Trustee; and the Committee may appoint any incorporated company having a capital and surplus of not less than $1,000,000, and qualified to act in the premises, as the sole Trustee under this trust agreement; but no such incorporated company shall be a Trustee jointly with one or more natural persons, or with any other such incorporated company.

Sec. 5. Upon the appointment of any new Trustee or Trustees, such instruments shall be executed as shall be necessary or convenient for vesting the trust fund in the new Trustee, or for providing evidence of such vesting.

Sec. 6. The receipt of the Trustees, or of any of them, for moneys or property paid or delivered to them or him, shall be an effectual discharge therefor to the persons paying or delivering the same, and no person receiving any such receipt shall be bound to see to the application of such moneys or property.

Sec. 7. The Trustees shall cause to be kept in books pro-

vided for the purpose, minutes of all resolutions and proceedings of the Trustees, and of the names of the members present at each meeting of the Trustees specifying whether they were present in person or by proxy. Such minutes shall be evidence of the matters therein stated and shall be conclusive evidence in favor of all persons acting thereon in good faith of all matters and things therein stated.

Sec. 8. The Trustees shall not be liable for errors of judgment, either in holding property originally conveyed to them, or in acquiring and afterwards holding any other shares of stock, bonds, notes, securities or other property, nor for any loss arising out of any investment, nor for failure to sue for or to collect the same, nor for any act or any omission to act (not in disregard or violation of any express provision of this agreement) performed or omitted by them, in the execution of these trusts in good faith, and each Trustee shall be answerable and accountable only for his own several acts, receipts, neglects and defaults, severally and respectively, and not for those of any other or of any agent properly employed by them, or of any bank, trust company, broker or auctioneer, or other person, with whom or into whose hands any trust moneys or securities may be deposited or come. Neither shall any Trustee be liable or accountable for any defect in title, invalidity or other defect, to, of or in the shares of stocks, bonds, notes, obligations or other properties or securities acquired for the trust, or for any loss unless it shall happen through his own several wilful default; and severally and respectively, the Trustees shall be entitled as above stated in section 6 of Article One and in the said collateral trust indenture securing the five per cent bonds, to prior indemnity out of the trust fund against any liability by them incurred in the execution of the trusts hereof. No Trustee of these

presents, however, appointed, shall be obliged to give any bond or surety or other security in respect of the trusts hereof.

Sec. 9. Every note, bond, contract, instrument, promise, undertaking, and every other act or thing whatsoever, executed or performed by the Trustees or any of them, shall be executed or performed by them or him only in the capacity as Trustees or Trustee under this indenture. The Trustees are not authorized to impose, nor shall they, at any time, by any act or thing done by them, impose or seek to impose any personal liability or obligation upon the Committee or any member thereof, or upon any holder of any participation share or of any certificate thereof or of any five per cent bond or of any other security issued by the Trustees under this trust agreement.

Sec. 10. No recourse ever shall be had, under or upon any note, bond, promise, contract, instrument, undertaking, obligation, covenant or agreement executed or performed by the Trustees as Trustees under this indenture, or by reason of the creation of any indebtedness by the Trustees, as Trustees under this indenture, for any purpose authorized by this indenture, against the Trustees individually or against the holder of any of the participation shares or the certificates thereof, or any other securities issued by the Trustees hereunder, or against any member of the Committee, either directly or indirectly by legal or equitable proceeding, or by virtue of any statute or otherwise; it being expressly understood and agreed that this indenture, and all obligations created hereunder by said Trustees, are solely the obligations of the trust estate, and that all such obligations, liabilities, covenants and agreements of said Trustees, as Trustees under this trust agreement, shall be enforced against, and be satisfied out of, the trust fund only, or such part thereof as shall,

under the terms and provisions of this indenture, be liable therefor; all personal liability of the Trustees, and of the holders of any certificates by them issued, and of the Committee and its members and of all beneficiaries under this agreement, being hereby expressly waived.

Sec. 11. From time to time, the Trustees may execute, and may file with the trustee, under the collateral trust indenture securing the five per cent bonds (or with the trustee under any instrument securing any bonds issued to pay off such five per cent bonds), a writing appointing any person or persons, or any copartnership or corporation, the agent or agents of the Trustees, in the name, place and stead of the Trustees, to sign any bond or coupon authorized to be issued under this trust agreement, or to sign any order or authority to deliver any such bond when certified pursuant to the provisions of the instrument whereunder such bond is issuable, or to sign any certificate of any participation share or share authorized to be issued under this trust agreement, or to sign and endorse any checks or drafts which the Trustees themselves might sign.

From time to time, the Trustees may revoke any such appointment previously made, and may appoint a substitute or substitutes with like power and authority; but no such revocation shall operate to annul, or in anywise to affect, any act or proceeding done or taken by any agent or agents previous to such revocation of authority and service of notice in writing thereof upon the trustee under said collateral trust indenture or other instrument aforesaid, or shall operate to annul, or in anywise to affect, any act or proceeding done or taken pursuant to the order of any agent or agents theretofore appointed as provided in this section, of the revocation of whose

authority notice in writing shall not have been given as above stated.

Until otherwise ordered by the Trustees, any bond or coupon or any certificate of any participation share may be signed in behalf of the Trustees by Sam R. Jenkins, of the city of Chicago, state of Illinois, hereby appointed the agent of the Trustees for that purpose; and, until otherwise ordered by the Trustees, without any further act or appointment hereunder, may exercise such powers of such Agent.

The death of the Trustees, or any of them, or of any successor to them, shall not operate to revoke any agency created pursuant to the provisions of this section.

ARTICLE SIX.

Section 1. No holder of any bond, participation share or certificate, or of any security or obligation issued under and in accordance with the provisions of this indenture, shall be entitled to terminate this trust, or any trust organized and maintained under this indenture, or to require any distribution or disposition of any of the securities held in trust hereunder, other than in accordance with the terms and provisions of this indenture.

Sec. 2. The death of any Trustee, or of any holder of any of said participation shares or certificates, or of any other securities issued by the Trustees, or of any member of the Committee, at any time during the continuance of this trust, shall not in any way operate to terminate this trust, and shall not entitle the legal representatives of such deceased Trustee, or of such deceased member of said Committee, or of such deceased holder of any of said participation shares or certificates or other securities, to terminate this trust, or to require

any accounting or sale or distribution of any of the securities or property held hereunder.

ARTICLE SEVEN.

Section 1. James B. Forgan, John J. Mitchell, E. K. Boisot, Harrison B. Riley, John A. Spoor, Edward Morris, Samuel Insull and Ira M. Cobe hereby are appointed to act as the original members of the Committee vested with the powers and discretions in this indenture specified.

Sec. 2. The Committee, as from time to time constituted shall consist of not less than five (5) nor more than nine (9) members. It shall not be necessary that any member of the Committee shall be a holder of any of the participation certificates or securities issued hereunder. The certificate holders from time to time may increase or may reduce the number of the Committee within the limits above mentioned.

Sec. 3. The Committee shall be elected at the first and at every subsequent annual meeting, or if not so elected at an annual meeting, they may be elected at any special meeting which shall be held prior to the next following annual meeting of the certificate holders, and shall continue in office until the next annual meeting, and until their successors shall have been chosen and shall have taken their places upon the Committee. Any member of the Committee shall be eligible for re-election.

Sec. 4. Any vacancy in the membership of the Committee, may be filled by the remaining members of the Committee; but any member so appointed shall continue in office only so long as the member in whose place he is appointed would have continued in office, and the remaining members of the Committee may act notwithstanding any vacancy in their number.

Sec. 5. Any member of the Committee may resign by pre-

senting his resignation in writing at a meeting of the Committee.

Sec. 6. The remuneration of the Committee shall be fixed from time to time by the certificate holders then entitled to vote, at any meeting thereof, and the amount thereof shall be divided among the members of the Committee in such manner as shall be determined by agreement among the members of the Committee, and in the absence of such agreement shall be divided among them equally. Until the remuneration is so fixed, each member of the Committee shall receive ten dollars for every meeting of the Committee that he shall attend, and except as herein provided no further remuneration.

Sec. 7. If a member of the Committee shall be called upon to travel or to perform other extra services, the Committee may determine his special remuneration, and shall provide for payment of such remuneration and his expenses in respect of such services.

Sec. 8. The Committee may act by a writing as hereinafter provided in section 17 of this article, or they may meet together for the transaction of business, and from time to time they may adopt such rules and regulations, and may alter or amend the same, as they shall deem advisable for the regulation and transaction of their business. They may prescribe the times and places of regular meetings of the Committee, which may be held without any further notice thereof; but except in pursuance of a special resolution passed at a previous meeting of the Committee or by agreement of all the members of the Committee no meeting shall be held at any place other than the city of Chicago.

Sec. 9. The quorum necessary for the transaction of business at a meeting of the Committee, shall be a majority of the then existing members of the Committee, present personally or

by proxy, of which members at least two shall be present in person. Such quorum shall have full power to exercise all or any of the powers, authorities and discretions for the time being vested in the Committee.

Sec. 10. The Chairman, or a majority of the existing Committee, at any time may call a special meeting of the Committee by giving one day's notice of such meeting. In computing such time Sundays and legal holidays shall be excluded. A notice thereof sent through the post-office, postage prepaid, in a sealed wrapper, addressed to any member of the Committee at his last known post-office address, and posted in the city of Chicago, shall be deemed sufficient notice to such member, whether the same shall be received by him or not. If any member of the Committee shall be out of the United States it shall not be necessary to give him any notice of such meeting. The members of the Committee may in writing or by attendance waive the notice required for a special meeting.

Sec. 11. Any member of the Committee from time to time in writing may appoint another member as his proxy to vote at any meeting of the Committee, or to perform any other act or duty as a member of the Committee hereunder.

Sec. 12. Questions arising at any meeting of the Committee shall be decided by a majority of the votes of the members of the Committee present personally or by proxy, and in case of an equality of votes the chairman of the meeting shall have an additional and deciding vote. Any resolution so adopted shall be the resolution of the Committee.

Sec. 13. The members of the Committee from time to time shall elect from their number a chairman, and they may elect also such other officers as the Committee shall deem advisable, which officers may or may not be elected from among the Committee. All of such officers unless removed as herein provided,

shall continue in office until the close of the next annual meeting of the certificate holders and until their successors shall have accepted their places. The Committee from time to time shall prescribe the respective powers and duties of such officers and shall fix the compensation, if any, of every officer and agent whom they shall have elected or appointed.

Sec. 14. The Committee at any time may permit any officer to resign his office, or by a resolution of the Committee may remove him from his office without assigning any reason therefor and may elect another person in his place, and likewise shall have authority to elect temporary officers to serve during the absence or disability of regular officers.

Sec. 15. The action of the Committee in respect of any matter shall be evidenced by a resolution passed by them at a meeting except as herein otherwise provided.

Sec. 16. A certificate signed by the chairman or the secretary of any meeting of the Committee at which any resolution is passed certifying that the signer was such chairman or such secretary, of such meeting, shall be conclusive evidence in favor of the Trustees, and all other persons, acting in good faith in reliance thereon, of the contents of such resolution and of all matters in such certificate contained relating to such meeting and the regularity thereof, and of the passage of such resolution; and no person shall be obliged to make inquiry as to any of the said matters, or as to the election or appointment of any person acting as a member of the Committee at such meeting, or be affected by actual or implied notice of any irregularity whatsoever therein.

Sec. 17. A resolution in writing signed by not less than two-thirds of the members of the Committee, in person or by proxy as above authorized, shall be as valid for all purposes as a resolution passed at a meeting of the Committee.

Sec. 18. The Committee shall cause to be kept in books provided for the purpose, minutes of all resolutions and proceedings of the Committee, and of the names of the members present at each meeting of the Committee, specifying whether they were present in person or by proxy, and minutes of all resolutions and proceedings of all meetings of the certificate holders. Such minutes, if purporting to be signed by the chairman or secretary of such meeting or of the next succeeding meeting, shall be evidence of the matters therein stated and of the regularity of the meeting, and that proper notice of the meeting was given if any was required, and a certificate signed by the chairman or secretary of such meeting or by persons certifying that they acted as such, shall be conclusive evidence in favor of the Trustees and all persons acting thereon in good faith of all matters and things therein stated.

Sec. 19. Subject to the provisions of this trust agreement, and the provisions of the collateral trust indenture securing five per cent bonds, the Committee shall manage and control the trusts created hereunder; ascertain and determine "the income of the trust fund" as provided in the collateral trust indenture securing the five per cent bonds; ascertain and determine "the net income of the trust fund" as provided in section 6 of Article One of this trust agreement; prepare and state an account of the income and expenditures of this trust for the annual meeting of the holders of participation shares as provided in Article Eight of this trust agreement; fix and determine the amount, and direct the use, application or investment of the surplus fund of the trust as provided in Section 2 of Article Four of this trust agreement; determine the use and application of income arising as mentioned in section 8 of Article Four hereof; apportion and direct the payment on the participation shares as dividends thereon of any moneys or

property applicable to such purpose; pay and discharge any and all expenses, obligations and liabilities incurred by or in behalf of the Trustees or the Committee in the administration of this trust; and consider and pass upon all questions and propositions where the consent, authority or approval of the Committee is required; and generally they shall possess and may exercise all such other powers as reasonably shall be required for the proper administration of the trusts created by this indenture: but the Committee shall not have power in disregard of any express provision of this trust agreement to incur liabilities or to create or to issue obligations.

Sec. 20. Any of the Committee may purchase, acquire and own any of the five per cent. bonds or any of the participation shares, free from accountability with respect thereto and may deal therein in all respects the same as any other person with any holder of five per cent bonds, or with any holders of any participation certificate, or with any Trustee or with any other member of the Committee or any other person.

Sec. 21. The Committee shall not be liable for errors of judgment in exercising any of their powers or discretions under this trust agreement, nor for any loss arising out of any investment, nor for failure to sue for or to collect any moneys or property belonging to the trust, nor for any act or any omission to act, performed or omitted by them, in the execution of their powers or discretions in good faith, and each shall be answerable and accountable only for his own several acts, receipts, neglects and defaults, severally and respectively, and not for those of any other or any agent properly employed by them, or of any bank, trust company, broker or auctioneer, or other person, with whom or into whose hands any trust moneys or securities may be deposited or come; nor shall any member of the Committee be liable or accountable for any defect in title,

invalidity or other defect to, of or in the shares, bonds, notes, obligations or other properties or securities acquired for the trust, nor for any loss unless it shall happen through his own several wilful default; and, severally and respectively, the Committee shall be entitled as stated above in section 6 of Article One, and in the said collateral trust indenture securing the five per cent. bonds, to reimbursement for their reasonable expenses and disbursements, and to prior indemnity out of the trust fund against any liability by them incurred in the execution of the trusts hereof. No member of the Committee, however appointed, shall be obliged to give any bond or surety or other security hereunder.

ARTICLE EIGHT.

Sec. 1. An annual meeting of the certificate holders shall be held, at twelve o'clock noon, on the Tuesday following the first Monday in February (or if such day be a legal holiday then on the next following Tuesday, not a holiday), in each year, at the principal office of the Trustees in the city of Chicago.

At each annual meeting, the Trustees shall lay before the certificate holders an account, as prepared and stated by the Committee, of the income and expenditures of their trust for the financial year last preceding such meeting, and also may submit to the certificate holders a report upon any other matter. The Committee also may submit to the certificate holders, any question, resolution or proposition, upon which the Committee shall desire the action of the certificate holders.

Sec. 2. At each annual meeting, the certificate holders shall elect the persons who shall act as the Committee for the ensuing year, and shall take such action as they may consider appropriate in reference to any and all other matters brought before the meeting.

Sec. 3. The Committee whenever they deem it advisable may, and upon the written request of the holders of certificates representing not less than twenty-five per cent. (25%) of all of the participation shares at the time outstanding, and then entitled to vote, shall call a special meeting of the certificate holders to be held in the city of Chicago. Every such request of certificate holders shall express the purpose of the meeting, and shall be delivered to the Committee, or to one of its members. In case for a period exceeding seven (7) days after such request shall have been so delivered, the Committee refuse or neglect to call such special meeting to be held within twenty-one (21) days after the delivery of such request, such special meeting may be called by the certificate holders signing such request or by any three (3) of them.

Sec. 4. The Chairman of the Committee shall be entitled to preside at every meeting of the certificate holders; but if he is not present at the commencement of the meeting, or, being present, shall not be willing to preside, the certificate holders present shall choose any certificate holder to preside as chairman of such meeting.

Sec. 5. At a special meeting of the certificate holders no business shall be transacted other than such as shall have been specified in the notice of the meeting.

Sec. 6. Written or printed notices of the annual meeting and of special meetings, specifying the time and place thereof, and in the case of a special meeting the purposes thereof, shall be given by the secretary of the Committee, or by some other person designated by the Committee, to each of the certificate holders, seven (7) days at least before such meeting. In event of the Committee refusing or failing to give notice of any special meeting requested to be called by the certificate holders in the manner hereinbefore provided, then the written or

printed notice of such meeting may be sent out by the persons calling the same as provided by section 3, of this Article Eight. The certificate holders may waive in writing the notice required for any meeting.

Nevertheless, a failure to give notice, or any irregularity in any notice of the annual meeting to be held as provided in section 1 of this article, or in the mailing thereof, shall not affect the validity of any such annual meeting, or any regular adjournment thereof, or of any proceedings thereat.

Every notice to the certificate holders required or provided for in these presents may be given to them personally, or by sending it to them through the post-office, postage prepaid, in a sealed wrapper addressed to each of them respectively at his address specified in the transfer books, and posted in the city of Chicago or in the city of New York; and in the case of such mailing shall be deemed to have been given at the time when it is so posted. In respect of any share held jointly by several persons, notice so given to whichever of them is first named in the transfer books, shall be sufficient notice to all of them. Any notice so sent to the registered address of any certificate holder shall be deemed to have been duly sent in respect of every share represented by such certificate whether held by him solely, or or jointly with others, notwithstanding he be then deceased, and whether the Trustees or the Committee or any person sending such notice have knowledge or not of his death, until some other person or persons shall be registered as holders. The certificate of the person or persons giving such notice shall be sufficient evidence thereof, and shall protect all persons acting in good faith in reliance on such certificate.

Sec. 7. The holders of certificates representing not less than one-fourth of all of the shares of the class of participation certificates, entitled to vote at any meeting, whether represented

in person or by proxy, shall constitute a quorum for the transaction of business.

Sec. 8. At all meetings of certificate holders, except as next hereinafter provided, every such holder, in person or by proxy appointed in writing, shall be entitled to cast one vote for each participation share registered in his name upon any question upon which such share shall be entitled to a vote.

For the purpose specified in section 15 of Article Four, or for any of the purposes specified in section 14 of this Article Eight, a vote may be cast for every such preferred participation share and for every such common participation share; but upon all other questions the voting right in respect of the preferred participation shares and of the common participation shares shall be mutually exclusive, that is to say:

So long as every semi-annual instalment of the cumulative dividends of $4.50 per annum, herein provided for, shall have been paid upon every preferred participation share within ninety days after the time fixed for any such payment, the holders of common participation shares shall have the right to vote in respect thereof, and such right shall be exclusive, and the holders of preferred participation shares shall not have the right to vote in respect thereof.

In case of any failure to pay any such semi-annual instalment of cumulative dividends upon the preferred participation shares within the period of ninety days after the same shall be payable, then, during such default and the further continuance thereof the holders of the preferred participation shares shall have the right to vote in respect thereof and such right shall be exclusive and during such continuing default the holders of the common participation shares shall not have the right to vote in respect of any such common participation shares.

As soon and as often as the payment of any such instalment

so in default shall have been made, and until the recurrence of such a continuing default, such right of the holders of the preferred participation shares to vote in respect thereof shall cease, and the exclusive right of the holders of the common participation shares to vote in respect thereof, shall revive, subject to the subsequent loss thereof as above provided upon the happening and during the continuance of any such subsequent default.

Nothing in this section contained either shall extend or shall limit the voting right of the common participation shares for the purpose specified in section 15 of this Article Eight.

Sec. 9. When any certificate shall be held jointly by several persons, any one of them may vote at any meeting in person or by proxy in respect of such certificate, but if more than one of them shall be present at such meeting in person or by proxy no vote shall be received in respect of such share unless the persons so present shall join in or shall assent to such vote.

Sec. 10. If the holder of any certificate be a minor, or a person of unsound mind, or subject to guardianship or to the legal control of any other person as regards the charge or management of such certificate, he may vote by his guardian, committee, or such other person appointed to or having such control, and such vote may be given in person or by proxy.

Sec. 11. For the purpose of ascertaining and defining the certificate holders entitled to vote at any meeting, the transfer books may be closed at the end of such day as the Committee shall specify, but not more than twenty-one days before the day of such meeting, and shall remain closed until the close of the meeting, and no person shall be entitled to vote at such meeting, whose name is not entered upon the transfer books prior to such closing thereof.

Sec. 12. If at the time appointed for a meeting a quorum be not present, the meeting shall be dissolved, if it be a meeting

called at the request of certificate holders or by certificate holders after such request as hereinbefore provided; but if it be a meeting otherwise called or convened in accordance with any provision of this trust agreement, the certificate holders present in person or by proxy shall constitute a quorum for the purpose of adjourning the meeting to a later date, but shall not constitute a quorum for the transaction of any other business.

Sec. 13. Except as otherwise herein provided, a majority of the votes given at any meeting shall be necessary and shall be sufficient to constitute the action of such meeting; and in case of an equality in number of votes, the chairman of the meeting shall have an additional and deciding vote.

Any action taken by the holders of certificates representing a majority, in amount, of all of the participation shares, both preferred and common, including a majority of the preferred participation shares, shall bind all the holders of participation shares in respect of all such shares and of the interest in the trust fund, provided that nothing shall affect the prior lien of any bond, or the prior and superior rights of the holders of preferred participation shares, and provided, further, that no vote given or action taken by the certificate holders shall authorize or shall be effectual to authorize the creation of any liability or the issue of any obligations except by the Trustees, and subject to all the limitations and provisions of this trust agreement against the incurring of liabilities payable otherwise than out of the trust fund and against the issuing of obligations except as above prescribed in subdivision (k) of section 16 of Article Four of this trust agreement.

Sec. 14. By a resolution passed by the votes of the holders of the certificates representing a majority of the total number of participation shares both preferred and common, including a majority of the preferred participation shares, then outstanding

such certificate holders (1) may remove any Trustee or Trustees under this trust agreement, and (2) may direct the Trustees to sell or otherwise to dispose of the securities constituting the trust fund, on such terms as will produce cash sufficient at least to pay all costs, charges and expenses, and also to pay the principal and the interest of all of said five per cent bonds then outstanding, together with a premium of five per cent. of such principal, or to pay the principal and the interest of any bonds issued to pay for the said five per cent. bonds, and any premium that may be required upon any such payment; and in the event of any such sale or disposition of the trust fund, may direct the Trustees to terminate the trust, and to distribute the proceeds in accordance with the provisions of this trust agreement.

Sec. 15. Unless and until there shall be a subsisting default in the payment of any instalment of the semi-annual cumulative dividend of $2.25 per share upon any of the preferred participation shares, the holders of the common participation shares, by resolution adopted by the vote of two-thirds of the number of such common participation shares then outstanding, given at an annual or at a special meeting of holders of participation shares, may alter the terms and provisions of this trust agreement; but no alteration shall be made in any way affecting rights of the holders of the said five per cent. bonds, or of any bonds issued to retire the same, or the security of any such bonds, or in any way affecting the rights and priorities of the preferred participation shares; nor shall any alteration ever be made, which shall authorize the Trustee or the Committee to represent or bind any certificate holder except in respect of his beneficial interest in the trust fund, or whereby any personal liability or obligation shall be imposed upon any Trustee, or any member of the Committee or any certificate holder under this indenture. No alteration shall be complete or effectual, until a certificate signed by

the chairman and secretary of the meeting at which the resolution is passed and setting out such resolution and the manner in which it was passed, shall have been delivered to the Trustees.

ARTICLE NINE.

Section 1. When this trust agreement shall have been signed and delivered by the parties of the first part and by any two of the parties of the second part, it shall become effective for all purposes with the same force as though on the day of the date hereof it had been signed and delivered by all of the parties hereto.

Sec. 2. In the construction of the provisions of this indenture, words in the singular number include the plural number, and words denoting males include females, and words denoting persons include firms and corporations, and the words corporations and companies include any corporation, association or trust, unless a contrary intention is to be inferred from the subject-matter or context.

This trust agreement has been executed in four counter parts, each of which shall be and shall be taken to be an original and all collectively but one instrument.

THE CO-OPERATORS OF AMERICA. A COMMON LAW TRUST.

Reported in In Re Parker et al., 275 Fed. 868.

ARTICLES OF TRUST made this 17th day of February, A. D. 1921, by and between W. S. CLARK, GUSTAVE KOPP AND LOUIS I. BLOCK, of Chicago, Illinois, settlors, as successors in trust to George A. Abbott, Carl Wisner and Viggo E. Bird, Trustees, who have resigned their trust, hereinafter called Party of the First Part, and Harrison M. Parker, and John Coe of Chicago, Illinois, and Viggo E. Bird of New London, Connecticut, Grantees, hereinafter called the Party of the Second Part, WITNESSETH, That

1. WHEREAS, Harrison M. Parker, John Coe and N. A. Hawkenson, heretofore have been acting under the designation of the CO-OPERATIVE SOCIETY OF AMERICA, under and by virtue of a common law trust which was evidenced by a certain Indenture and Declaration of Trust, bearing date the 20th day of February, A. D. 1919; and recorded in the Recorder's office of Cook County, Illinois, as Document #6554582, and attached hereto and marked Exhibit A. and

2. WHEREAS, the party of the second part so acting as a common law trust, in and by said Indenture and Declaration of Trust had the power to acquire, hold and dispose of property, real personal and mixed, of every kind whatsoever, and to prosecute and conduct all manner of mercantile, financial and industrial business and all manner of dealing and trading in the said property, and to convert the same into cash and distribute the same, in payment of the beneficial interests at par, all of which by said Indenture and Declaration of Trust, Exhibit A, reference being had hereto, will fully and at large appear, and

3. WHEREAS, the party of the second part, under and by virtue of said Indenture and Declaration of Trust acquired certain real estate in the State of Michigan, which real estate is fully described in Exhibit B hereto annexed and made a part hereof, and

4. WHEREAS, under said Indenture and Declaration of Trust the party of the second part became and were entitled to certain other real estate located in the State of Michigan and which real estate is fully described in Exhibit C hereto attached and made a part hereof, and

5. WHEREAS, the party of the second part, under and by virtue of said Indenture and Declaration of Trust acquired and became entitled to certain other real estate situated in the State of Illinois and the controlling interest in the Peoples Life Insurance Company, Randolph Building Corporation, Rico Milk Products Company, and the Amboy Manufacturing Company, which are described in Exhibit D hereto annexed and made a part hereof and

6. WHEREAS, the party of the second part acquired and became the owners of 10,000 shares of the capital stock of no par value of the Rochdale Wholesale Company, a Corporation, and which corporation the party of the second part used and employed as an agency for conducting the wholesale and retail grocery business, and which corporation in the prosecution of said grocery business installed certain warehouses and retail grocery stores and provided certain fixtures in each of said stores, and which warehouses and stores are described in Schedule E hereto annexed and made a part hereof, and

7. WHEREAS, the party of the second part acting under said Indenture and Declaration of Trust divided the said trust estate into 400,000 equal shares of beneficial interests,

and sold and disposed of the same, or the greater part thereof, at the par value of $25.00 per share, and

8. WHEREAS, the party of the second part in the exercise of their power to borrow money and mortgage said assets in security therefor and in furtherance of the trust plan to secure such expansion of the trust business as would justify Nation-wide Co-operation throughout the several States as rapidly as the conservative management of the trust would permit, duly issued 2,000,000 debenture interests of a par value of $50.00 per share, and at the same time authorized the execution and delivery of a trust deed to secure the payment of the same, and in pursuance thereof the party of the second part executed and delivered same to George A. Abbott, Carl Wisner and Viggo E. Bird, trustees named in the said deed of trust, which is attached hereto and marked Exhibit F. hereinafter referred to, and

9. WHEREAS, the grantees, in and by said trust deed, Exhibit F, were empowered and authorized to appoint their successors in trust and have heretofore, in pursuance of their said power and authority appointed W. S. CLARK, GUSTAV KOPP and LOUIS I. BLOCK, of Chicago, Illinois, as trustees, herein called the parties of the first part, and

10. WHEREAS, by said trust deed Exhibit F, the party of the first part became vested with the title as trustees to all the said property and assets, real, personal and mixed, and all future acquisitions, increment and increase thereof, and all the business and good will of said trust estate for the benefit of the owners of beneficial interests therein and for the holders of beneficial debenture interests thereof, all which matters and things by reference to said Exhibit F will fully and at large appear, and

11. WHEREAS, by paragraph 23 of the said Trust Deed,

Exhibit F, it is provided that if for any cause whether competitive, economic, political, legal or official, the grantors thereof being the party of the second part herein should be attacked or molested in their management or right to carry out and perform their said Articles of Trust and for such or for any other reason the grantees thereof, should feel themselves insecure or unsafe in and about their trust as provided by said trust deed, Exhibit F, then and in the event thereof, the grantors thereof should ipso facto be and stand divested of their title, estate and possession in that behalf and by means thereof the grantees, should ipso facto be invested with said title, estate and possession; and thereupon said estate and possession should be delivered to the grantees and their successors in trust, being the party of the first part hereof, to be by them administered, managed and conducted as a going concern in furtherance of the intent and objects of said Exhibits A and F all which matters by reference thereto will fully and at large appear, and

12. WHEREAS, the grantors thereof have been attacked and molested in their right to perform their said trust, as aforesaid, wherefor and for said other reasons and causes the party of the first part hereof, under and by virtue of the said deed of trust, thereupon elected to and have exercised their option, right and power, vested in them under and by virtue of said last mentioned deed of trust, Exhibit F, and in pursuance thereof have heretofore and do hereby declare that they have taken possession of all and singular the property of said trust, real, personal and mixed of every kind and nature, whatsoever, and of all of the business and good will of the said trust, to manage and dispose of the same for the best interest of the holders of said beneficial interests and of the said beneficial debenture interests, and now are man-

aging the same as a going concern for the purposes aforesaid, and the party of the second part by good and sufficient assignment and conveyance, for further assurance, have heretofore relinquished and conveyed to the party of the first part all their right, title and interest in and to said property in that behalf, in fee simple, and

13. WHEREAS, the party of the first part, in and by said trust deed, Exhibit F, in the event that they should take the possession and management aforesaid, are given the power by amendment or by their declaration of a new trust to reorganize said trust and the business and affairs thereof, to change and merge said debenture interests into beneficial interests, and by irrevocable power to appoint trustees therefor to take the absolute title in fee simple of said real estate and to said assets and to carry out and perform the trust hereby declared for the protection and benefit of the cestui que trust aforesaid, in the ultimate net profits and final distribution of the proceeds of the corpus thereof, and

14. WHEREAS, by diverse acquisitions and increment and further property, real, personal and mixed, the assets, business of the stores, warehouses, office buildings, insurance company, subsidiary companies and good will of the trust estate have attained a value sufficient to justify expansion to the proportions of interstate co-operation and the business of the trust is in a safe and prosperous condition for the protection of the cestuis que trust, whereby they are receiving the benefits of discounts, dividends, interest and profits without any unreasonable deductions for salaries, overhead charges, nor of the usual division of approximately one-half of the profits to corporate promoters; wherefor the party of the first part do not deem it for the best interest of the trust estate, nor of the cestuis que trust to foreclose their said trust

deed, Exhibit F, for the purpose of sale and distribution of said assets, and

15. WHEREAS, there are at this time interested in said trust estate upwards of 75,000 people, owners of beneficial interests and debentures, who are dependent upon the production and distribution of food stuffs by and through upwards of 100 grocery stores and warehouses and upon the outlet of production of diverse farms and factories and which producers and consumers are financially interested in said trust estate and look to the diverse forms of business thereof for the profits and distribution thereof to their several interests in said trust upwards of aggregating 400,000 beneficial interests and a substantial part of two million beneficial debenture interests and the people are rapidly availing themselves of the advantage of co-operation heretofore extended to them in the manner hereof, as a welcome means of escape from the unconscionable profiteering of rapacious tradesmen, and

16. WHEREAS, the party of the first part, in and by said trust deed, Exhibit F, upon taking possession of said trust estate for the causes aforesaid are vested with power, in reorganization of said trust and the increase of the assets thereof, to divide and increase the corpus of the trust estate and by dividing the same into aliquot parts, increase the number of beneficial interests thereof in proportion to the increase of said assets, and to merge said beneficial debenture interests into any increase in beneficial interests, and

17. WHEREAS, the economical and successful administration of said trust estate in its diverse ramnifications of various kinds of business, mercantile, financial and industrial, of production, transportation and distribution, co-operating for mutual success, requires the systematic training of talent in the several lines thereof and therewith the creation of a reason-

ably permanent tenure of employment to such expert talent, so as to minimize the attendant cost and loss of labor turnover, which only the absolute and permanent control of a common law trust with succession by means of transferable shares will permit in a dependable degree, and

18. WHEREAS, by means of the prevalent form of business organization throughout the country and the country-wide associations of manufacturers, wholesale, retailers, bankers and transportation companies, the business of the country has ceased to be conducted by the laws of economics but has become a system of organized plunder perpetrated upon the producer and the consumer, and

19. WHEREAS, by the prevalent methods of transportation, storage, distribution and marketing of the products of farms and of factories handling such products, the distributors and dealers in such commodities systematically resort to every species of fraudulent degrading, forestalling, engrossing and monopolizing the supply and the means whereby the supply of such products should flow freely to the consumer at prices fixed by the law of supply and demand and thereby in repressing and destroying the supply and in fraudulent and oppressive practices in and about the making of returns as to classifications, grading and prices to the producer for his products based on the cost of production, the dealer fixes a fictitiously low price to the producer and by means of the repression and destruction of the supply the associated dealers fix a fictitiously high price, to the consumer, and

20. WHEREAS, by the common-law and the law of economics, the interest of the producer and the consumer, in the flow of commodities, is the primary desideratum and the art of competitive trading by tradesmen as an occupation for profit is secondary thereto and becomes parasitic by the pre-

vailing associations of traders whereby by common consent and conspiracy prices are artfully manipulated to the detriment of the producers and consumers, and

21. WHEREAS, the professional traders and financiers of the country apply their activity on the theory that the public is legitimate prey for commercial and financial exploitation, and that the manipulation of the resources of the nation, public and private, are fit subjects for private plunder, and so have become a by-word and reproach to all modern economic methods and

22. WHEREAS, the public authorities do not enact adequate laws prohibiting fraudulent degrading, forestalling, engrossing or monopolizing of the supply, or facilitating the means of transportation and distribution and do not enforce such laws as are enacted to that end and make no effort to punish the destroyers of crops and commodities in the field or in transit, and thereby the "flow of commodities" has become merely a "stream of profit" to the trader in which the law of supply and demand is a negligible factor, and

23. WHEREAS, the producer, whether of farm commodities or other products of labor, though he cannot fix the price of his products, is required to pay for his supplies and machinery such prices to dealers and manufacturers as are fixed artfully and fictitiously by so-called "economists" or "statisticians" who are commonly employed to make such prices as the public regardless of supply are supposed to be "able" and can be made to pay, and thereby the law of supply and demand has become a system of fictitious practices by tradesmen to the detriment of the producer and the consumer, and

24. WHEREAS, by the business methods herein mentioned, commercialism as ordinarily practiced has become a national vice and is the source of the most imminent public danger, the at-

tempted curbing of which by so-called anti-trust legislation has been attended by administrative sham battles in the face of which the highest court of the land has declared that it cannot base its decisions upon the principles of economic law, and the increment of property values of the country by the exploitation practiced upon the producers and the consumers has gravitated to the hands of an unduly restricted number of persons, and

25. WHEREAS, by the common law the producers and consumers of the country primarily have the unquestionable right, until they deprive themselves thereof by prohibitive amendment of state constitutions or unwittingly fail to adopt constitutional amendments to curb state legislatures from enacting legislation prohibiting co-operation in the production and distribution of the commodities of life, at fair prices according to the law of supply and demand, whereby the people will derive the benefits and profits, free from the exploitations of fraudulent and vicious commercialism, and thereby effectuate the principle that government is instituted among men to protect the weak against the aggressions of the strong and cunning and

26. WHEREAS, it is the fundamental merit of the co-operative plan hereinafter set forth, whereby the trust, as an organization, retains no profit whatsoever for itself, but that all the profits go to the cestui que trust; that such advantages go to the people as a whole and are therefore an economic factor which operates to the universal betterment of the community; that such merit broadly distinguishes the co-operative trust plan from close business organizations which are designed primarily to build up and accumulate private fortunes for the promoters and organizers of business enterprise; that in the co-operative trust plan are wholly absent the motives, temptations, means and effects in the disposal of beneficial interests to the general

public, which have been instrumental in bringing stock selling operations of close business organizations under the scrutiny of the police power of the several states whereby, by means of so-called "Blue-sky Laws" it is attempted to prevent the issuance of securities which would operate to defraud the public and that, therefore, the issuance of beneficial interests of the co-operative trust hereof is not within the evil and hence not within the purview, prohibitions, requirements nor sanctions of such legislation. For the reasons stated, the departments, administering such legislation in the various states, will apprehend that the "Blue-sky Laws" of the several states are unscientific in conception, form and substance; concentrate the marketing of corporate securities in the hands of "Special Interests" commonly allied with what is known as "Invisible Government;" fail to take into account the rule that commercial and industrial enterprise is almost invariably established by money gathered from the people and almost never by the capital of banks; that banks or other "money interests" do not "assist" enterprise before the potential values of enterprise are "established" but pursue them as a fat source of loot after they are "established;" ignore the fact that success in dealing with a bank is measured by the ability of the enterprise to conceal the necessity for such "assistance;" fail to put the frauds of stock-jobbing and market manipulations of the "interests" on the same footing with "wild cat" securities; base issues on reputation rather than character of securities; put quotations of securities on the curb or exchange on a par with the qualities of government or municipal bonds; take no account of quotations procured by fraudulent manipulations of securities listed on stock exchanges and boards of trade; provided no means of distinguishing between wild cat speculations and bona fide potential earning power; depend for their administration on fancy, prejudice, discrimination and ca-

price rather than fact and means and methods of sound judgment; and thereby subject securities to the blight of public prejudices, regardless of merit, and discourage investments therein by the people, and

27. WHEREAS, there is not presently available any form of statutory incorporation by which the affairs of the trust estate could practically be administered so as to give the cestuis que trust all the profits and at the same time permit any reasonable permanence of the rights of the trustees and the talent employed in such an estate; in which respect, also, the costs of statutory incorporation; the perennial exactions of visitorial administration; the constitutional impediments to interstate migration; the great diversity and constantly changing and vexatious legislation of the several states and multitudinous and conflicting requirements as to reports; and the increasing tendency to regard the status of statutory incorporation as a fruitful source of revenue instead of a means of defraying merely the costs of administration, renders any statutory incorporation cumbersome and vexatious and unduly expensive and prohibitive and inimical to the best interests of such an estate and of the cestuis que trust thereof; and wherefore the party of the first part deem it for the best interests of the estate and for the cestuis que trust to create and declare a trust estate of the said assets, business and good will subject to all encumbrances, debts, claims and demands whatsoever in that behalf as hereinafter provided, and

28. WHEREAS, the party of the second part under said Indenture and Declaration of Trust, Exhibit A, heretofore issued approximately 400,000 interests, the certificates of which in words and figures are substantially as follows, to-wit:

$25.00 $25.00
Beneficiary Certificate
General Offices Chicago, Illinois.
Number Beneficial Interests.

THE CO-OPERATIVE SOCIETY OF AMERICA.
A Common Law Trust.
400,000 Beneficial Interests $25.00 Each.

THIS IS TO CERTIFY THAT.....is the holder of.....Beneficial Interests in THE CO-OPERATIVE SOCIETY OF AMERICA. This Certificate is one of a series of certificates issued by the Trustees of the said Society, said Certificates representing in all Four Hundred Thousand Beneficial Interests of Twenty-Five Dollars each. The certificates and the Interests represented thereby are non-assessable and are described in and are subject to a Declaration of Trust in favor of said Society, dated the Twentieth day of February, 1919. The Certificates are transferable on the books of the Society by the holder or holders in person or by Attorney upon surrender and proper endorsement. The holder hereof shall be entitled to his or her proportionate share of the benefits arising from the operation of the Society by the Trustees named in said Declaration of Trust, or by their successors, payable as the said Trustees may from time to time elect.

Dated this.....day of.....19...

THE CO-OPERATIVE SOCIETY OF AMERICA.

By.....
.....and
.....
Trustees.

29. WHEREAS, the party of the second part under said trust deed, Exhibit F, heretofore issued 2,000,000 beneficial debenture interests, the certificates of which in form are in words and figures substantially as follows, to-wit:

FORM OF DEBENTURE.

$50.00 each $50.00 each
General Offices Chicago, Illinois
Number..... Beneficial Debenture Interests

THE CO-OPERATIVE SOCIETY OF AMERICA.
A Common Law Trust For National Co-Operation.

THIS IS TO CERTIFY, that.....

is the holder of.....Beneficial Debenture Interests in THE CO-OPERATIVE SOCIETY OF AMERICA, of a par value of Fifty Dollars ($50.00) each. This certificate is one of a series of certificates issued by the Trustees of the said Society, said certificates representing in all two million benefits of a par value of fifty dollars each. The certificate and the interests represented hereby are non-assessable and are authorized by a Declaration of Trust in favor of said Society dated the Twentieth day of February, 1919, and are secured by a Trust Deed to George A. Abbott, Carl Wisner, and Viggo E. Bird, Trustees, and are subject to the terms thereof, are transferable on the books of the Society by the holder or holders to the extent of 20 shares only by one person in person or by attorney upon surrender and proper endorsement. The holder hereof shall be entitled to his or her proportionate share of all the profits and benefits arising from the operation of the Society by the Trustees named in said Declaration of Trust, or by their successors, payable as the said Trustees may from time to time elect; and are payable as to principal at the maturity of said trust or convertible at the option of the holder as provided in the trust deed securing the same. Any purchases, sale or ownership of more than twenty shares is null and void to the extent of the excess.

DATED THIS.....day of....., 19...

.....

.....and

.....

Trustees

30. WHEREAS, said beneficial interests of an expressed value of $25.00, by reason of their increase in value, are by said trust deed, Exhibit F, made convertible share for share into said beneficial debenture interests of a par value of $50.00 each, and

31. WHEREAS, a portion of said twenty-five dollar interests have been converted and exchanged and are in process of exchange by the holders for said fifty dollar debentures and another portion of said debentures have issued and the remainder are in process of issue to other contributors to said trust estate, both of which forms of interests are hereby convertible into interests issued hereunder.

TITLE.

32. NOW, THEREFORE, in consideration of the premises and of the acceptance hereof by the party of the second part, under and by virtue of the power granted in said deed of trust, Exhibit F, the party of the first part, W. C. CLARK, GUSTAV KOPP and LOUIS I. BLOCK as trustees, hereby declare and establish a trust as at common law (not intended to be a partnership nor a joint stock company, nor any form of associatioin of the certificate holders inter sese) and appoint thereto the party of the second part, as trustees, and grant, remise, release, convey, alien, confirm and quit claim, sell, assign, and deliver to them, Harrison M. Parker, Viggo E. Bird and John Coe, as trustees hereinafter referred to, all the said property, real, personal and mixed which was of the said trust estate as by the said Exhibits A, B, C, D, E and F, which are hereto annexed and made part hereof, the same to all intents as if said property therein described and referred to were here now fully described and set forth, reference being had thereto, will fully and at large appear, and all the rights, tenements and hereditaments thereto appertaining and belonging, and all other and further additions, accumulations and accretions thereto at any future time together with all the business, good will, assets, rights and credits which were of the said trust estate heretofore designated as The Co-Operative Society of America, TO HAVE AND TO HOLD the same to them and their successors and assigns in fee simple, and to stand seized of all the right, title and interest therein and possession thereof in law and equity, and to convert the same into personalty as rapidly as the trust business will permit in the discretion of the trustees and subject to all encumbrance, debts, claims and demands whatever, contracted in the business as heretofore conducted, for the uses and trust herein declared, to-wit:

ALIQUOT PARTS AND INCREASES.

33. The trust estate of the corpus at present ascertained is divided into two million (2,000,000) interests of a par value of Fifty ($50.00) Dollars per interest, to be disposed of in the discretion of the trustees.

The Trustees, in the course of the trust business herein established, are empowered to increase the corpus of the trust estate by accepting further contributions of property or cash and any such contributions of cash, whether or not the same may be immediately invested in the purchase of property, or whether used to purchase or invest in property of a permanent nature or in fluctuating property such as stocks-in-trade or whether used in the payment of incumbrances or other debts, shall be taken and held to be an increase in and addition to the corpus of the trust estate and be divided into aliquot parts or interests of a par value of Fifty ($50.00) Dollars each to the extent of such increase and addition to the trust estate, and to the amount thereof the Trustees, may immediately dispose of beneficial interests at par or at such price as the same may be by the Trustees deemed to be worth, having in view the accretion by profits and good will to the whole trust estate and by the method so provided the Trustees may increase the issuance and disposition of beneficial interests to any amount to which the corpus of the trust estate may be increased up to and beyond said two million (2,000,000) interests to any extent and without limit whatsoever and without the necessity of any further authorization by amendment hereof.

SCOPE.

34. The Trustees in the Co-operative management of the property and business of the trust may acquire, hold, manage, lend, donate, use, barter and exchange, pledge, mortgage, or sell,

deal or trade in any and all kinds of property, whatsoever, and in relation thereto may conduct any and all kinds of business whatsoever; may acquire, hold, conduct, or dispose of any and all kinds of mercantile, industrial, manufacturing, financial transporting, storage or refrigerating business whatsoever; engage in any and all kinds of technical, professional, industrial, social, educational and publicity enterprise or business whatsoever; acquire, hold, operate and dispose of mines or deposits of ore, coal, stone, ocher, megnesite, or any and all clays, earth products or mineral substance; oil and gas wells and pipe lines and refineries; forests, saw-mills and lumber yards, fisheries and canneries; smelters and rolling mills; coke ovens and lime kilns; carbide works; factories for the manufacturing of clothing; boots and shoes, and building material; canneries of food stuffs of all kinds; car shops and railway rolling stock; shops for the building of automobiles, wagons and other vehicles; hangars and aeroplanes and seaplanes; all manner of building material and sources of material, and means of manufacture thereof; manufacturers of and dealing in farm machinery; all manner of foundries, smithies and machine shops; ship yards; locomotive works, textile mills and factories; carpenter shops; paint shops; plumber shops; decorators and architectural business and all manner of building operations, contracting, constructions, engineerings, trades and business; the production and dealing in dyestuffs; all manner of dealing in medicines, arts, sciences and crafts; have all manner of patents of inventions of or concerning machines, methods, process, substances and designs, trademarks and copyrights in and about any and all of the manufactures, business, trades, arts, commodities or means whatsoever herein mentioned; all manner of ways and means of transportation by land and water and aeroplanes; all manner of electrical apparatus and machinery, telegraphy, tele-

phone and wireless; transmission of electrical currents for all purposes; warehouses, docks, tugs, ships and steamers; railroads, rolling stock freight houses and passenger stations and street railways and interurban railways and franchises for the same; grain elevators, stock yards; creameries, cheese factories, condensories, drying, dehydrating and dessicating establishments; public markets; furniture and musical instrument factories; printing plants; newspapers and periodicals and binderies; advertising; all manner of wholesale and retail stores of food stuffs, tobacco, cigars, sporting goods, jewelry, wearing apparel and adornment and housing material; farming farms and farm crops; dealing in and making of farm machinery and implements; producing, manufacturing and marketing the products of farms, factories, mines, forests, streams, oil fields and shale, and all earth deposits and substances whatsoever; and to acquire, hold, vote, in person or by proxy, deal in and dispose of all manner of corporate stock or securities, or buy and convert the beneficial interest of any companies or common law trusts, engaged in any and all kinds of business or manufacture, and the stocks of insurance companies, of all kinds of trust or guaranty companies, or banks and safety deposit companies, office buildings, hotels and restaurants, telegraph. telephone and aerial transportation lines and submarine transports; to contract for, buy, barter, sell and convey in any transactions concerning any and all of said properties and business in like manner as an individual; to have a common seal; to have succession by transfer of shares; to sue and be sued; to sue for and recover upon all contracts, claims and debts; to settle, compromise or submit to arbitration any disputes and controversies; to borrow and lend money or securities; to receive money on deposit and discount commercial paper where not prohibited by statute; pledge or mortgage their assets; pledge their credit;

guaranty and assure or underwrite the issues, obligations and credits of corporations, firms, individuals, estates or trusts; issue scrip, notes, bonds, mortgages or other evidence of debts and interests, indebtedness or obligations whatsoever; declare and pay dividends and participation benefits in cash or to pay the same in scrip or other dividend certificates out of the net profits or out of the proceeds of the trust in cash or by division in specie; to invest and re-invest the funds of the trust; to create and establish sinking, amortization, guaranty and assurance funds, whether the nucleus thereof be derived from the trust or from investors in the trust or from the trustees hereof or from any corporation, firm, trust or individual dealing with the trust or whether such nucleus be formed by trust funds out of profits or corpus or with securities of governments, municipalities, corporations, firms or individuals or by the purchase as of the present worth of any given fund, policy or undertaking of whatsoever nature or kind maturing at a given future date.

PROFITS.

35. The cestuis que trust, ultimately shall be entitled to all the net profits of the trust enterprise which may remain over and above encumbrances, liens, charges, debts, claims, expenses, costs, wages and salaries in and about the management of the property and business of the trust estate.

PLAN.

36. The business and property of the trust estate shall be conducted and managed so as to procure the greatest possible co-operation among and between the elements of production, transportation and distribution at the least possible expense of providing the free flow of commodities between the producers

and the consumers on the basis of supply and demand, and without profit to the trust as an intermediary trading organization over and above the cost of administration and to avoid and prevent the fraudulent engrossing of trade, product or means of distribution and of arbitrarily fixing of prices to producer and consumer.

ALLOTMENTS, PRIORITIES AND CONVERSIONS.

37. The trustees have and hereby do set aside and allot not exceeding 400,000 of the said beneficial debenture interests heretofore issued, the same to be used in substitution for such outstanding beneficial interests as have heretofore been issued, at the option of the holders thereof, share for share, without loss of priority to the extent of the value of said 10,000 shares of Rochdale Stock or substitutions therefor as herein elsewhere provided.

38. The trustees at their option, after the ensealing hereof, may continue the further disposition of said debenture interests or in lieu thereof, so far as the number authorized may be undisposed of and in addition thereto for any increase of corpus thereafter, may issue a certificate in form which in words and figures shall be substantially as follows, to-wit:

FORM OF CERTIFICATE.

$50.00 Each **Certificate No.....** **$50.00 Each**
General Offices **Chicago, Illinois**
Numbers To .....
Both Inclusive **Beneficial Interests**

THE CO-OPERATORS OF AMERICA
known as
THE CO-OPERATIVE SOCIETY OF AMERICA.
A Common Law Trust For National Co-operation.

This certifies that by reason of the organization of the co-operative elements of production and distribution by the undersigned to overcome the prevailing evil practices of manufacturers, distributors

and traders..... has contributed to and is the owner of.....Beneficial Interests of an expressed value of $50.00 each fully paid and non-assessable in the Trust Estate of the undersigned otherwise known as THE CO-OPERATIVE SOCIETY OF AMERICA, a Common Law Trust, created under Articles of Trust providing for the pro rata payment of all the participating distributive benefits and profits of the Trust Estate to the owners of the Beneficial Interests.

The holder hereof is entitled to the benefit of collective buying and other co-operative advantages of production and marketing and other business by the affiliated enterprises of the trust operations, which may be realized by the undersigned trustees.

Any sale, purchase or ownership by any one person of more than twenty interests is void as to the excess. Interests to the number of twenty only in any one individual are transferable by endorsement and delivery of certificates thereof and the transfer on the books of the Trustees in person or by Attorney in Fact, which transfer record is conclusive evidence of ownership.

Dated this.....day of.....19...

.....(SEAL)
.....(SEAL)
.....(SEAL)
Trustees.

39. The said beneficial debenture interests sold for cash and now outstanding shall have preference on all the property, real, personal and mixed wherever situated of the trust estate but in case it should appear at the dissolution and distribution of the trust estate that the proceeds of sale thereof shall not be sufficient to pay all beneficial interests and debentures, then outstanding, then said interests remaining uncontroverted into debentures and the debentures substituted therefor shall have priority in so far as concerns the present value of said 10,000 shares of Rochdale Wholesale Company stock or substitutions therefor now in the trust estate to the extent of the said interests converted and unconverted to the amount of $57.50 per interest. The priority so given shall inhere in any debentures which may be substituted for beneficial interests but the differ-

ence in value in such exchange shall not be construed as a premium, bonus or right:—provided that the trustees may give such suitable right on such substitution as to them may seem proper, in which event said priority will be superseded, satisfied and displaced.

40. The holders of said 400,000 beneficial interests and the holders of said debentures whether received in exchange for said beneficial interests or paid for in cash may at the option of the holders be exchanged for the beneficial interests hereby provided share for share with such rights as the trustees may deem fair and proper.

41. The said interests to the number of debentures remaining unallotted and undisposed of shall be transferable by endorsement and transfer in person or by proxy upon the books of the trustees. The disposition of said undisposed of interests and the substitutions of said 400,000 debentures for said outstanding beneficial interests shall be made by and under the supervision of the trustees or as herein otherwise provided. Any sale or sales or ownership of more than twenty debentures or interests to or for any one person, directly or indirectly is inimical to the co-operative enterprise and shall be deemed and be null and void and the excess above twenty interests shall not be entitled to registry or transfer on the books of the trustees nor be entitled to recognition in the payment of dividends or distribution of profits or principal. Neither shall any sales of interests be made unless at least 80% of the proceeds be paid free of all charges or deductions to the Trustees, and upon receipt of contributions for said interests the Trustees shall apply the same in units of $1000. In acquiring further shares of the capital stock of said Rochdale Wholesale Company or other subsidiary corporation or trust which may be used as an agency in accomplishing the co-operative enterprise of the trust estate

or other approved and secured income bearing or profit sharing stocks or bonds and real estate or preferably in the shares of said subsidiary trust agencies of the grantors' trust estate or other property, real, personal, or mixed, as additions to the corpus of the trust estate.

42. The said real estate situated in the State of Michigan is subject to certain contracts of sale heretofore entered into for amounts aggregating approximately $350,000.00 but the proceeds of sale thereof, as promptly as the same shall be received shall be invested in other real estate or in income bearing or profit sharing stocks; interests in common law trusts or bonds or stocks of various corporation agencies, which the Trustees use in the performance of their trust.

43. In case by existing contracts or otherwise, there shall be disposed of, any of the real estate or securities heretofore agreed to be sold, and any of the parties interested in such sales will deposit the reasonable market price thereof in escrow subject to this trust, whereby the trustees may receive and apply the same in the purchase of other real estate or securities of equal or greater value for the trust estate then the Trustees shall release the said real estate, but the purchaser thereof shall not be required to see to the application of the purchase money paid by him.

44. The Trustees shall continue to permit the conversion of said beneficial interests and out of the contributions for the further disposition of beneficial interests invest a suitable part thereof in stock of said Rochdale Wholesale Company, its assignee or other agency in that behalf, and thereby enable said company or its successor to establish the quota of stores and marketing facilities commensurate with a suitable proportion of interests at any time issued and the Trustees may otherwise carry out the intent of said Articles of Trust, Exhibit A, and

trust deed, Exhibit F, which they may deem necessary, for the profit and security of all parties as their interests by previous subscriptions for interests on partial payments fully performed may appear, including the practice of allowing discounts on purchases made and interest on partial payments by holders of beneficial interests or debenture interest holder of this trust estate.

ADMINISTRATIVE POWERS IN GENERAL.

45. The party of the second part acting in their collective capacity as Trustees and herein referred to as the Trustees and as the Board of Trustees, shall so far as practicable be designated as The Co-operators of America in and about their form of advertisement of doing business and thereby for brevity and convenience may execute their contracts and business engagements so far as such form and style shall not be contrary to law; own property and conduct all kinds of business without limit of extent or value; shall have power and discretion to sell any of the property of the trust estate, real, personal and mixed, and convert the same into cash for the purposes of the business of the trust herein provided; hold the legal title to all property at any time belonging to the trust and shall have and exercise the exclusive management and control of the same; and the right of the said Trustees to manage, control and administer the said trust estate shall be absolute and unconditional and free from the control or management of the certificate holders; make and perform contracts of every kind with any person, firm, association, or corporation, persons, municipalities, bodies politic, county, or state, government, colony or dependency thereof, and without limit as to amount, to draw, make, accept, endorse, discount, execute and issue promissory notes, scrip, drafts, bills of exchange, warranted bonds, debentures, and other negotiable

and transferable instruments and evidences of indebtedness whether secured by mortgage or otherwise, so far as may be permitted by any custom or laws, state or federal; have offices, conduct the business and promote the objects hereof, in any and all the States, and District of Columbia, the territories and colonies of the United States, and in foreign countries, without restriction as to place, time or amount; adopt by-laws; hold official trustees' meetings; conduct the business of producing, collective buying and distributing of the trust estate in a co-operative manner and to the end that the producers and consumers who shall be holders of the beneficial interests of the trust estate shall receive all the net profits thereof; meet all competition of producers and distributors in any branch of production, commercial or financial activity whatsoever, in any manner which may not be unlawful, to the end that commodities shall flow freely from the producer to the consumer without undue or unreasonable trade restrictions or monopoly, but by the economic law of supply and demand; combine on the basis of co-operation by territorial, political or occupational subdivision, with any other common law trust which is conducted on the co-operative plan hereby presented; eradicate any and all of the evils mentioned in the preambles hereof; assist the nation in peace or war by the contribution of organization talent, men, money or material; discountenance and oppose foreign control of American Newspapers or other means of publicity or education; refrain from amalgamating co-operatively or otherwise with any society or combination for foreign propaganda having the design or effect to deceive our people; deal with foreigners in tangible articles of trade only and without regard to race or creed but at arms length; appoint trustees; increase the number of trustees hereof in multiples of three or thereafter reduce them by like proportion; resign their trust;

appoint and nominate their successors in trust; which successors in any degree removed may in like manner appoint his successor; keep regular minutes of trustees' meetings and do any or all of the things herein set forth to the same extent as natural persons might or could do, and in any part of the world, as principals, agents, contractors, trustees, or otherwise, and either alone or in company with others.

SPECIFIC POWERS.

46. All acts to be done by the Trustees, including the alienation or encumbering of real estate may be performed by the said Trustees, namely, Harrison Parker, Viggo E. Bird and John Coe, or their successors in any degree removed, who are hereby made Trustees when duly nominated and confirmed as herein elsewhere provided. All parol contracts when in writing or partly in writing may be signed by any two of said Trustees. Any verbal contract made in the ordinary course of the trust business by any one of said trustees shall be good and sufficient to bind the trust estate.

47. Any Trustee may acquire, own and dispose of beneficial interests in this trust to the same extent as if he were not a Trustee hereof; they may also buy, own and dispose of such interests as trustees on behalf of the trust to any number and reissue the same.

48. The Trustees are authorized to employ all necessary or proper agents, servants, brokers, attorneys, employees or counsel, to carry into effect the purpose of the trust herein created, and to protect and preserve the same, and to provide and pay out of said Trust Estate the compensation, fees, commissions or expenses incurred in the management thereof. To contract for and on behalf of said trust estate, and to bind the same and

its property to the performance of such contracts; to borrow money on behalf of such trust estate on such terms and conditions as said trustees shall deem best, and to bind said estate and its assets to the payment of such indebtedness and to pledge and incumber any property of said estate, whether real, personal or mixed, for the security of the indebtedness so incurred, under such terms and conditions as to the Trustees may seem best, and to agree upon, approve and fix, execute and deliver and perform in the name and on behalf of the said trust estate, any deed, pledge, mortgage, bond, note, endorsement or guarantee, trust deed, simple contract or any other instrument which may be necessary or proper to carry out the terms of this trust. But neither the said Trustees nor the said certificate holders nor any of them shall be in any manner personally liable by virtue of any contract, note, scrip, bond, deed of trust, mortgage or other instrument, executed under the terms of this paragraph, but the same shall fully bind the property of the said trust estate for the performance thereof. The said Trustees are hereby authorized to do, or cause to be done in any lawful manner, all the things which are incidental, necessary or proper to carry fully into effect all of the purposes herein enumerated or powers hereby conferred; the general authority given being intended to control and make fully effective the power and authority of the Trustees under this instrument, notwithstanding the specific enumeration and description thereof herein.

49. The Trustees shall, in their own names, as Trustees of said estate doing business as the Co-operators of America, bring any suit or action which in their judgment shall be necessary or proper to protect this estate or to enforce any contract made for the benefit hereof, and to defend in their discretion any suit or action against this estate or against the Trustees hereof, or against any employe or any holder of beneficial inter-

ests herein, civil or criminal, as may heretofore or may hereafter be instituted. The said Trustees are expressly authorized to bring or defend such suit in their discretion or to compromise and settle any suit, claim or controversy in which the said estate is interested, as to them may seem best, and to discharge the same out of said estate and its assets; and they are specially authorized to pay or transfer out of this estate and its assets, all sums of money or property necessary to discharge any judgment against them in their capacity as Trustees, together with all court costs, or other costs, including counsel and attorneys' fees and also to pay out of this estate or its assets, such sums of money, or transfer or appropriate property thereof, for the purpose of settling, compromising, or adjusting any such claim or controversy, together with any such costs and expenses connected therewith, and all of such expenditures shall be treated as expenses of executing this trust.

50. All expense incurred by these Trustees in carrying out the terms hereof, whether heretofore contracted or now existing, as well as all liabilities incurred by them in the execution of this trust, whether arising from contract or tort, shall be considered as expenses of executing this trust, which shall first be paid out of the assets and properties hereof, and which shall be a first and prior lien against the said estate and property, superior to all others.

ORGANIZERS.

51. The Trustees shall provide a corps of organizers whose duty it shall be to guide and aid the producers or consumers in the several localities of sufficient number to justify the trust in the installation of co-operative manufactories, retail stores, and other enterprises and to receive a sufficient amount per capita to cover the outlay in that behalf and to conduct the general

trust enterprise and to evidence such contributions by the issuance of certificates of beneficial interests in the trust estate; employ persons who shall contribute to the trust and take beneficial interests and who shall be trained and skilled in producing, buying or selling the products of persons who shall be minded to contribute to the trust estate and take beneficial interests therein and instruct such producers in the production, preparation, manufacture, sorting, classifying, packing and shipping thereof so as to pass inspection at destination and prompt payment therefor without loss to the producer; train and appoint persons to install and manage neighborhood retail stores and in the several lines of trade, manufacture, art, profession, occupation, invention or production; and in conducting of department stores and country general stores; wholesale stores; warehousing, cold storage and transportation; maintain a publicity department for the education of the public in the benefits of co-operation; and to perform the duties in the said several lines of business when the same shall be acquired by the trust; and in general to oversee the statistical, fiscal and financial affairs of the trust estate.

ADVISORY TRUSTEES.

52. The Trustees may appoint as advisory trustees such persons as may volunteer and as the trustees may deem fit for such position, without compensation except as they may be actively employed in the business of the trust. The persons so appointed shall be of pronounced favor toward the co-operative plan hereof and may severally acquaint themselves with the executive duties of some branch of the business into which the trust may be divided and classified or in the general executive management of the trust. Such advisory trustees may attend meetings of the trustees when invited thereto but shall not be

entitled to a vote nor to any executive powers nor to partake in the title to the property of the trust estate. When in the opinion of the executive trutsees any such advisory trustees are competent they may be nominated and appointed as trustees and successors to the trustees as herein elsewhere provided for.

DELEGATION.

53. The Trustees or their successors hereby are vested with power to appoint any individual or corporation as agent or as trustee to perform the trust hereby created, whether in delegation of the powers hereby created or required to be performed or in the exercise of the powers of such appointee.

Whenever in this trust deed the trustees are referred to expressly or by implication the meaning and intent thereof shall include any and all appointees, and be subject to the rights, benefits and obligations hereof.

SUBSIDIARY TRUSTS.

54. The Trustees may classify the several lines of the Trust's business and organize the same severally so as to secure co-operation between them by character of business, trade or occupation, or by locality or territorially, as by experience may to them seem most desirable; train or procure persons of expert talent in each of the several classifications or lines; create, settle and declare a distinct, self-sustaining and co-operative subsidiary trust, of the general tenor hereof, of each of the several lines and classifications, the same to be divided into aliquot parts for the issue of Beneficial Interests thereof to be deposited with these trustees, subject to their right to sell the same to the holders of interests in this trust not exceeding twenty subsidiary interests to any one person, and providing that per-

sons dealing with such subsidiary trustee shall look only to the property of the subsidiary trust and saving this trust and the trustees and cestuis que trust harmless therefrom.

55. It is expressly declared that the trustees may acquire in whole or in part the capital stock of any corporation for the purpose of adding the enterprise co-operatively to the trust estate; and in case a subsidiary trust shall be formed of such corporate enterprise the trustee may give the beneficial interests of such subsidiary trust in payment therefor. Provided however that in lieu of buying the capital stock of any corporation the trustees, in case any onerous conditions may otherwise and unforeseen be attendant thereon, may buy all the property, real, personal and mixed and the stock-in-trade, business and good will of such corporation, subject to or free of the debts and liens thereon as may be agreed upon and in payment thereof may give the beneficial interests of any subsidiary trust into which the same may be organized.

It is further expressly declared that after such purchase, for said purpose or any formation of a subsidiary trust the subsidiary trust interests shall not be sold unless as a condition precedent all the purchasers of such subsidiary trust interests shall be holders of beneficial interests of this trust estate; provided that in the event of the formation of a subsidiary trust of corporate enterprise or purchase of the assets thereof all the subsidiary trust interests may be given in purchase thereof or in conversion for corporate stock in such enterprise.

56. In case the trustees should decide to exercise their power to acquire or to declare a subsidiary trust of the property, real, personal or mixed, and the business and good will of any corporation then the holders of the corporate stock thereof who may be cestuis que trust herein shall consent or be taken to consent thereto and to convert their corporate stock into benefi-

cial interests into which the subsidiary trust assets shall be divided as may be determined by the trustees at the time they shall create such subsidiary trust.

COMPENSATION.

57. The Trustees, for performing their official duties which shall consist exclusively of attending trustees' meetings, as compensation and fees, shall be entitled to charge and deduct an amount not exceeding 4½% of the net profits provided for the trustees under the Articles of Trust, Exhibits A and F, and in addition to such compensation they severally for any active service they severally may perform in the business of the trust shall be entitled to such reasonable compensation as, for such services as they may perform, is usual and customary for like service, in case they necessarily devote their time to the trust business.

BY-LAWS.

58. The Trustees may adopt by-laws for the holding of stated meetings and other meetings of the Trustees to be held from time to time anywhere in the United States upon the call of the Secretary; they may make, adopt, amend or repeal such by-laws, rules and regulations not inconsistent with the terms of this instrument, as they may deem necessary for the conduct of their business or for the government of themselves, their agents or representatives; to fix the compensation of any or all agents or employees they may appoint, and are likewise authorized to pay themselves such compensation for their active services as they may deem reasonable.

59. The Trustees may cause to be kept by a Secretary appointed by them, a record of all meetings of the Trustees, which record shall be similar in character and of the same effect

as that kept in case of corporation directors, and so far as strangers to this trust are concerned, shall be conclusive against the Trustees of the Acts and Doings therein stated.

NOMINATIONS, QUALIFICATIONS, DUTIES, REMOVALS,

COMPENSATION.

60. Every Trustee or successor in trust shall at all times keep in the official minutes of the Trustees his nomination in writing signed by him, of some person, from among the advisory trustees, as his successor in trust. The successors in trust respectively of the present trustee in whatsoever degree removed, in addition to an earnest zeal, which shall be manifested by more than lip service, for the co-operative principles and plan hereof, shall concern, embody and perpetuate three general qualifications, severally, to-wit: The successor of Harrison M. Parker in whatever degree removed shall be expert in financiering, business organizing and executive qualities; the successor of Viggo E. Bird in whatever degree removed shall be generally concerned with the occupationally organized public; and the successor of John Coe in whatever degree removed shall be generally representative of the enlightened and unorganized public and having to do with educational matter. In case the trustees increase their number of executive trustees in multiples of three as herein elsewhere authorized, such increase shall be attributive equally to said three general qualifications or to some specific subdivision thereof respectively, and their successors respectively, in whatever degree removed, shall have qualifications and concern and be nominated in like manner, as aforesaid;

The said trustee and successor, representative of said expert qualities and concern in financiering and business organization,

shall be and continue the executive head of the trustees and any additional trustee allotted to such division of qualification shall have concern only with such subdivision thereof as the executive trustee shall direct other than that of executive head of the trustees. The executive trustee shall at all times have the personal custody of all articles of trust and documents appertaining thereto.

Any active duties as to detail, which may be necessary in and about said general divisions and subdivisions other than attendance of trustees meetings and the functions of the executive trustee or other purely official functions may be performed by experts in the respective particulars for compensation as directed by the respective trustees; or the trustees respectively or any of them may at their option devote their time thereto and be entitled to a reasonable compensation for such active service over and above the amount of 4½% of profits for attending trustees' meetings and performing their purely official functions.

Persons nominated as aforesaid, unless objected to in writing on the ground that they are not in favor of the co-operative business methods of the business carried on by the trustees and have not said qualifications shall be appointed and confirmed by the trustees when the trustee so making such nomination shall for any reason cease to be trustee. Appointments, resignations or other defections of trustees shall be evidenced by memorial in the trustees minutes which shall be sufficient as to real estate titled and other trust business.

The successor in trust of the executive trustee, in any degree removed, shall be executive trustee subject to removal by the board of trustees for embezzlement, intentional fraud, gross incompetency, gross neglect, gross mismanagement or gross disloyalty, to the co-operative plan or business hereof, upon charges in writing duly filed with the Secretary of the Board of

Trustees and upon thirty days' notice to such executive trustee of the trial and due and lawful proof thereof before said Board of Trustees, sitting as a trial commission; a complete record of the evidence and proceedings of which trial and conclusions of fact and decision of the commission shall be preserved. No court proceedings shall be begun against such executive trustees before such trial shall have been had.

FAILURE TO ACT.

61. In the event of the death, resignation, refusal or inability of any or all of the trustees to act in and about the performance of this trust or by reason of any disability or disinclination to act in this or any other jurisdiction the trustees or remaining trustees acting collectively, may accept any resignation, appoint his or their successors whose nomination in writing each trustee and successor in trust, in whatever degree removed, shall constantly have and maintain in the records of the trust) and fill any vacancy; in any which events any successor so nominated and appointed hereby is made successor in trust, who by virtue of such appointment shall be hereby deemed to be *ipso facto* vested with all the title, rights, duties, powers, obligations and emoluments in this behalf without any formal conveyance, and the trustees so displaced shall thereupon by virtue hereof *ipso facto* stand divested of the same without any formal conveyance.

62. Any such successor in trust shall be entitled to the immediate possession of the property and of the business, good will, franchises, interests, rights, accounts, commercial paper, and profits and of the records and books of account of the business and affairs and all records of the trust estate and of the management, control and operation of the same,

and until the actual delivery thereof to the successor in trust any trustee failing so to act shall be held and taken to be tenant at will thereof for the successor in trust and shall deliver possession thereof on demand to the successor in trust and in case of refusal of the outgoing trustee to make such delivery, the successor in trust shall take possession by any lawful means, directly or indirectly; in which respect a memorial in the trustees minutes thereof shall be conclusive evidence of the taking of possession and the rightfulness thereof.

IMMUNITIES.

63. The said Trustees shall use ordinary and reasonable diligence in the performance of this trust, but shall not be liable to the certificate holders or any of them for any act, default, failure or negligence in or connected with the execution of the said trust, provided the same shall not amount to and constitute fraud, embezzlement or wilful breach of trust, and they shall not be obliged to give bond to secure the due performance of this trust by them.

64. The Trustees, except to the extent of the property immediately held by them, nor in any manner whatsoever as to the several subsidiary trusts, shall not be held personally liable for any debts or claims against the trust estate or against such subsidiary trust; nor shall the subsidiary trustees be held personally liable for any claims or debts against the business of such subsidiary trust estate beyond the property immediately in the hands of such subsidiary trustee and all contracts of the trustees or subsidiary trustees respectively which bear the legend "THE PARTY CONTRACTING HEREBY AGREES TO LOOK SOLELY TO THE PROPERTY OF THE TRUSTEE AND TO ABSOLVE THE TRUSTEE AND CESTUIS QUE TRUST FROM

PERSONAL LIABILITY" shall be sufficient notice to such contracting party of the limited liability hereby provided as of a trust at Common Law.

65. By the failure or neglect of such trustee or trustees to so declare in any instrument, contract or obligation entered into for the purpose of carrying out the objects of this trust, mentioned in any paragraph herein, shall not be construed to render said Trustees nor any of them individually liable thereon, but the same shall be obligations binding upon and performable only out of the assets of said trust estate.

66. The Trustees, nor the subsidiary trustees, shall not be liable for any losses of property or investment or transaction due to any act or omission by them in good faith; nor in any event or circumstance shall they be held liable for the acts or omissions of each other, nor for the acts or omissions of any servant, agent or attorney appointed or acting for them.

67. The holders of said debentures or beneficial interests shall not have any right by reason of error or misjudgment in the management of the trust short of embezzlement or actual and intentional fraud upon the beneficial interest or debenture holders to commence and prosecute any sort of action against the trustees or any of them or against the property or against other security holders before the dissolution of this trust, and then only in the event that the trustees, on written notice particularly specifying the alleged cause as aforesaid, arbitrarily refuse or negligently delay for the space of ninety days to take such action as may be directed in writing by a majority of said holders, but the trustees shall not in any event be obliged to defend any action or to begin any suit or action on the demand or notice of the said holders of interests or debentures as aforesaid unless they first tender

to the trustees such reasonable indemnity for attorneys' and solicitors' fees and other usual liabilities and expenses as the trustees in their reasonable discretion may require, for the protection of the trustees and the interests of beneficial interest or debenture holders.

68. In case any trustee, officer, agent or attorney or owner of beneficial interests, for any reason, shall be held to, or be under any personal liability, not due to his acts in bad faith, then such person shall be held harmless and indemnified out of the Trust Estate from and of all loss, cost, damage or expense by reason of such liability, and such liability upon which said person is personally liable, as aforesaid, shall be deemed a direct claim against the assets of the trust and such person paying the same shall be and become subrogated to all of the rights of the holder of said claim against the assets of this trust, and shall be deemed a creditor thereof to the extent of such claim or liability, and if, at any time, the income from the Trust Estate shall be insufficient to provide for such indemnity and to satisfy all liabilities of and claims upon it, then the trust Estate shall be applied to the payment of the claims against it, including the claims for which such persons are liable, pro rata.

69. The death of a holder of a certificate of beneficial interests or trustee during the continuance of this trust, shall not operate to terminate the trust, nor shall it entitle the representatives of the deceased holder to an accounting or to take action in the courts or elsewhere against the trustees; but the executors, administrators, or assigns of any deceased holder of beneficial interests or debenture, shall succeed to the rights of said decedent upon the surrender of the certificate and the issue of a new certificate therefor.

70. This trust shall not be terminated or the administration

thereof in any wise interfered with or suspended by the death of any such beneficiary or his incapacity for any reason, or by his said interest or interests being by process of law subjected to the payment of debts, or in any way vested in any heir, assign, creditor, or purchaser, of the said beneficiary or in any trustee, assignee, or officer of any court, or by the same in any manner being divested out of the beneficiary and transferred or vested in any other person, administrator, executor, trustee, assignee or personal representative. But any such person who may, in any such manner acquire or become vested with the ownership of such certificate, shall thereupon succeed to and become entitled to all the rights and equities of the beneficiary therein named, and to the beneficial interests in this trust estate, upon surrendering the original certificate to the said Trustees with such proof of ownership as may be reasonably required by them, and the issue in lieu thereof of a new certificate, and notwithstanding said change of ownership or interest in any such certificate, or death or insolvency of the original owner thereof, the said trust estate shall continue and remain in full force until terminated as herein provided.

71. The ownership of Certificates of beneficial interests issued at any time by the trustees hereunder, shall not entitle such owner to any title in the trust property whatever; nor to the right to call for a partition or division of the same, nor shall such ownership entitle the holder to an accounting nor for the declaration or payment of dividends unless in case of a specific showing of intentional fraud or embezzlement.

72. The trustees shall have no power to bind the holders of beneficial interests and such holders and their assigns and all persons or corporations extending credit to, contracting with, or having any claim against the trustees or the trust estate,

or any subsidiary trust for the payment of any amount claimed as owing under such contract or claim or for the payment of any debt, damage, judgment, decree, or of any money that may otherwise become due or payable to them from the trustees or subsidiary trustees, so that neither the trustees or subsidiary trustees, nor the holders of beneficial interest, present or future, shall be personally liable therefor.

73. Neither the said certificate holders, nor any of them, nor their property shall be liable for any indebtedness or liability created by, growing out of, or arising from the execution of said trust estate, whether arising from contract or tort of the said trustees, their servants, agents or employees, in the administration of said estate. The trustees, personally, nor either of them, nor their private property, whether real, personal or mixed, shall be in any manner, liable for any debt or liability incurred by said trustees, or any of them in the administration or management of the said estate, whether arising from contract or tort of the said trustees or any of them or their agents, servants, or employees; and neither said trustees nor any of them shall ever be held personally liable for any damage or injury to person or property caused by or arising from, incident to, or growing out of the executions of said trust; nor shall they be liable for the acts or omissions of each other. That the assets of the said trust estate only, shall be liable for any indebtedness, liability, wrong, injury, or tort incurred, arising or growing out of the administration of the said trust estate by the said trustees or any of them or for any act or negligence or default of their servants, agents, or employees in the administration of this estate.

74. The name in which a certificate or beneficial interest, or debenture interest, stand on the books of the trustees, shall

be considered by the trustees conclusive evidence of ownership, and they shall not be required upon transferring such certificate, or paying dividends on such interests, or distributing assets upon the termination of the trust, or at any other time, to inquire in any way into the identity or relations between assignor and assigns, pledgors or pledgees, trustees and beneficiary, guardian and ward, or in any other similar relation, and shall have the right to conclusively presume without inquiry, that the holder of any such certificate as shown by their books is the real and true and unconditional owner thereof.

75. So far as strangers to this trust are concerned, a resolution of the Trustees authorizing a particular act to be done shall be conclusive evidence in favor of such strangers that such act is within the powers of said Trustees, and no purchaser from the Trustees or one loaning money to the trustees shall be bound to see to the application of the purchase money or loaned money or other consideration paid or delivered by or for said purchaser or lender to or for said Trustees.

REORGANIZATION.

76. If for any cause, whether competitive, economic, political, legal or official the trustees or any of them, or any successor in trust, should be attacked or molested in the management or right to carry out and perform this trust, then the title and the right of any such trustee so attacked to the possession of this trust estate shall *ipso facto* be divested and be vested in the successor of such trustee and if thereby or for any other cause the trustees should deem themselves insecure and unsafe in their protection of the rights of the said *cestui que trustent* then the trustees at their election and

option may surrender to their successors the possession of said property, business and assets of the trust estate without filing any bill in equity in this behalf, and such successors by means of the present corporate or by other agencies may manage and conduct the business and affairs of said trust as a going concern for the protection of this trust and in accordance with the spirit and intent hereof and for the equal or *pro rata* benefit of the holders of beneficial interests and debentures in parity or priority as such interests may appear; in which event the trustees so attacked or molested *ipsi facto* shall be divested of all right to retain such title and possession and shall surrender and deliver the same on demand to the successor in trust; in any of which events the successors in trust hereby are vested with the power to reorganize this trust in any administrative respect whatsoever by amendment of these articles of trust in any manner or extent which in their judgment will be conducive to the best interests of the business, the holders of beneficial interests, and the beneficial debenture holders; provided only that in whatever form of trust said reorganization may be effected the substantive rights of the *cestui que trustent* to the ultimate benefits be duly conserved; and to such purpose the trustees in any said events or for any other reason are further empowered to organize a corporation or corporations with power to do said business on the co-operative plan of these Articles of Trust, if State or Federal Legislation shall authorize such incorporation by statutes which in the judgment of the trustees would not burden the business and management with cumbersome restrictions, impracticable conditions and expensive franchises taxations and visitorial exactions in favor of the political or governmental treasury, preventive or prohibitive of co-operative commercial enterprise and membership benefits therein.

DISSOLUTION.

Dividends and Distribution.

77. The trustees from time to time, are authorized to declare and pay dividends or participating distributive benefits out of the income or proceeds from time to time decided by them from the Trust Estate, to the intent that this trust estate shall be nonaccumulative as to profits.

78. If, on the 20th day of February, A. D. 1940, the trustees should deem it for the best interests of the trust and *cestui que trustent* to dissolve the trust, they shall sell the then remaining corpus of the estate in such time and manner, in parcels or en masse or as a going concern, and upon such terms as to them may seem proper and right and distribute the proceeds as herein provided; but if in the judgment of the trustees such dissolution would be a needless sacrifice of the property and a destruction of good will they shall not be obliged to dissolve the trust at the time above mentioned if they shall deem it for the best interest of the business and of the cestuis que trust to continue the trust's business; but on said date if then there should remain outstanding any beneficial interests under said Articles, Exhibit A, or debenture interests under said trust deed, Exhibit F, of which the holders or any of them should require payment, the trustees at their option, without dissolving the trust, shall have the right to make payment thereof out of the trust estate according to their priorities to the extent of the value of the Beneficial interests issued under the articles of trust, Exhibit A, which shall not have been converted and to the extent of the debenture interests issued under the trust deed, Exhibit F, and remaining unconverted as determined by the usual and current value thereof, in the usual way by the trustees, and

which amounts shall be held and taken as and for the value and share in the proceeds of sale of the estate as upon dissolution and liquidation and paid out of the corpus of the trust assets or the trustees may borrow money on the mortgage security of the trust assets to pay the same; and the interests so paid out may be reissued to such lender or to other persons who may contribute to the corpus of the trust assets.

79. The holders of the beneficial interests hereby created, shall, in addition to such dividends, as the trustees may, from time to time declare and pay, be entitled on the dissolution of the trust; to the proceeds of sale of the corpus of the trust estate in proportion with the par value of the said beneficial interests held by them at that time, and according to the parities or priorities herein provided to the extent the priorities shall not be waived or displaced, which sum or sums the trustees, by their acceptance of this trust, hereby agree as trustees to pay on dissolution at that time.

80. Upon the dissolution of the trust, for the purpose of winding up the affairs hereof, and liquidating the assets of the trust, the persons then constituting the Trustees shall proceed to wind up its affairs, liquidate its assets and distribute the excess after payment of the debts, among the holders of beneficial interests and debentures and for that purpose shall continue in office until such duties shall have been fully performed.

IN WITNESS WHEREOF, the parties have hereunto set their hands and seals in token of the creation, declaration and acceptance of the trust hereby created, for themselves and their successors, assigns and appointees at the place and on the day and year first above written.

.....(SEAL)

.....(SEAL)

.....(SEAL)

Trustees and Settlers.

(.....(SEAL)

ACCEPTED (.....(SEAL)

(.....(SEAL)

Trustees.

THE GUARANTY & ACCIDENT LLOYDS.

This association was organized for the purpose of conducting an insurance business in the State of Ohio. It was held that this was an association, exercising a franchise. The case is reported in 51 Ohio State 163, 37 N. E. 828, 24 L. R. A. 298. Following is copy of the instrument under which they sought to do an insurance business in Ohio:

"The undersigned being desirous of entering into the business of individual guarantee and accident insurance:

"1st—Do each individually agree to deposit with an advisory committee to be appointed by the undersigned as hereinafter provided, the sum of one thousand dollars.

"2d—Such sum or sums so subscribed by each individual subscriber shall be held by the advisory committee for the individual account of each subscriber, together with all earnings thereon, as a fund to meet any loss which such subscriber may sustain upon any policy of insurance subscribed by him beyond the net amount of premiums earned and received on said policy.

"3d—Such advisory committee shall consist of five of the subscribers to this agreement, or such further subscribers as may hereafter adopt and execute this agreement, and may be selected and appointed once in each year on the Wednesday succeeding the first Monday in January, at an annual meeting of the subscribers. An annual meeting shall be called by the advisory committee, by mailing or handing to each subscriber a notice for such meeting at least five days before the time fixed therefor. The advisory committee to act until the Wednesday succeeding the first Monday of January, 1891, shall be composed of

(1.) (2.)
(3.) (4.)
(5.)

"Such advisory committee and every member of such committee shall continue to act as such until a new member or a new committee shall be appointed.

"All questions shall be determined by a majority of such committee, and three members thereof shall constitute a quorum. Each member attending a meeting shall be paid $5 in gold for each attendance. Such committee shall meet at least once in each month; and oftener if they deem it necessary.

"4th—Such committee shall have the custody and management of the subscription fund above provided for, and the general charge and supervision of all the business to be done; shall supervise and direct the attorneys in fact who may be appointed by the subscribers, exact and receive accounts from such attorneys in fact, examine, audit, and pass upon the same, receive from said attorneys in fact and receipt for any earnings applicable to the several accounts of either of the undersigned, and make such use, disposition, and investment of the fund and earnings as they shall deem most advantageous and secure.

"5th—If any member of such committee shall cease to be an insurer under the terms of this agreement, he shall cease to be a member of such committee and the remaining members thereof shall select from among the other subscribers at the time being some person to fill the vacancy thus occasioned. Any vacancy in the committee shall be filled in the same manner.

"6th—The business management of the insurance to be effective for and on behalf of each of the individual subscribers hereto shall be in charge of Aaron H. Rathbone, Frederick W. Satterlee, Cleveland D. Fisher, and John G. Dorrance, as attorneys in fact of each subscriber hereto; such business

shall be carried on at an office to be known as the office of the Guarantee and Accident Lloyds; each subscriber shall execute and deliver to them a power of attorney, in form and effect to be approved by the advisory committee, and by Messrs. Coudert Brothers, counselors at law, giving to said attorneys the necessary power for the purpose indicated. The powers thus conferred on said attorneys shall be subject to and shall be exercised under the direction, supervision, and control of the advisory committee above referred to, and all policies or other instruments binding the subscribers must be signed by at least two of said attorneys. The compensation of said attorneys jointly shall be a commission of ten per cent on the amount of the premiums received in each year; in consideration of which the said attorneys agree to defray all charges of office rent, salaries, stationery, advertising and all other expenses incident to the proper care and prosecution of the business, except agent's and broker's commissions, losses, legal expenses, taxes and the pay of inspectors employed under the direction of the advisory committee. Such attorneys shall be entitled as further compensation for their services, to twenty-five per cent of the net profits of each year's business as found and determined by the advisory committee. Such profits may be determined and paid over quarterly.

"7th—Such attorneys shall at all times, when so required, furnish to the advisory committee full statements of all insurance, expenses and premiums, whether due or collected, and every member of the committee shall at all times have access to all the books and papers of the attorneys. The attorneys shall keep separate accounts for each of the subscribers to this agreement, and each subscriber shall at all times have access to his individual account.

"8th—The advisory committee shall cause to be made up

on the 31st day of December in each year all the accounts of the several subscribers hereto. If there should be any balance to the credit of the several subscribers over and above the amount of each subscription, the advisory committee shall determine how much, if any thereof, it is advisable to pay to each subscriber; and no part thereof shall be paid to or withdrawn by any subscriber hereto, so long as he shall remain a party to this agreement, except upon the order or direction of the advisory committee. Each subscriber shall, however, be entitled to receive from such advisory committee at the end of each calendar year a certificate showing the amount to his credit at the end of such year. If account of any subscriber hereto shall show upon such annual statement that the amount to his credit is insufficient to cover the current liabilities against him, the advisory committee shall have the power and authority to call upon such subscriber for the payment of such an amount as will in the judgment of such committee be sufficient to meet the deficiency, and such amount when paid shall be credited to each individual subscriber in like manner with his original deposit and if not paid within three months from the date of such call such subscriber shall thereupon cease to be a party to this agreement except in regard to transactions already entered into on his behalf.

"9th—In case any of the subscribers hereto should desire to withdraw from this agreement, and shall give thirty days' notice in writing of such desire to the advisory committee, and in case any of such subscribers shall become insolvent or embarrassed in business or in case of any other reason, it should be deemed advisable in the opinion of a majority of the advisory committee that any subscriber should withdraw from this agreement, the attorneys aforesaid shall upon written notification by the advisory committee, cease to act as

the attorneys for such subscriber, except in regard to transactions already entered into on his behalf, and such subscriber shall thereupon cease to be a party to this agreement, except in regard to such previous transactions. In case of the withdrawal of any subscribers for either of the reasons above stipulated, and in case of the death of any subscriber, his account shall not be closed until three months after the expiration of all risks in which he may have been concerned as such subscriber, and all sums to his credit, either in the hands of the advisory committee, or of the attorneys, shall be irrevocably pledged to the payment of any losses for which he may be or become liable, and of any amount which may be due or unpaid by him growing out of the insurance business herein contemplated; and neither such subscriber nor his assigns or legal representatives shall have the right to withdraw any part of such sum to his credit, until all such losses or other debts are fully satisfied and discharged. At the expiration of all such risks and upon payment and satisfaction of such other indebtedness, the balance remaining to the credit of such subscriber shall be paid over to him or his legal representatives or assigns.

"10th—In case, however, any subscriber who duly withdraws from this agreement, or the legal representatives of any deceased subscriber, should procure a new subscriber satisfactory to the advisory committee, then, upon such new subscriber assuming, in writing, all the liabilities and indebtedness of the former subscriber under this agreement, or arising from any business contemplated therein, and duly executing this agreement, the former subscriber, or his legal representatives, shall be released and discharged from all responsibility as a party hereto.

"11th—At the annual meeting of the subscribers already

provided for, any and all questions arising under this agreement, or in reference to the business herein contemplated, may be called up and disposed of. Special meetings may be called by a majority of the advisory committee, or by any ten subscribers, in the manner provided for annual meetings. The subscriber may waive a five days' notice, and accept in writing a shorter notice. Matters brought before any meeting shall be determined by the vote of a majority of those represented at such meeting, either in person or by proxy. At any meeting, annual or special, a quorum shall consist of the representatives of a majority of the subscribers. No change, however, can be made in the terms of this agreement, except by the vote of three-fourths of all the subscribers hereto at a meeting specially called for the purpose by notice stating the exact terms of the change proposed.

"12th—All claims for losses shall be disposed of by the attorneys under the supervision of the advisory committee, and shall be paid out of the funds in their hands, and when these are insufficient, then out of the funds in the hands of the advisory committee. Any suit brought upon any claim arising out of the business contemplated by this agreement, and any questions arising as to any legal liability upon any such claims, shall be referred to Messrs. Coudert Brothers, as counsel, under the supervision of the advisory committee, and such committee, with the advice and concurrence of said counsel, shall have power to settle, compromise, or contest any such suit or claim as to them shall seem expedient, and are authorized, upon the advice and concurrence of said counsel, to stipulate for and on behalf of each several subscriber hereto, that such subscriber will abide by the event of any such suit, whether at the time of such stipulation such subscriber be or not a party to this agreement.

"13th.—In the policies issued under the present arrangement, neither of the subscribers shall be made jointly liable with the others, nor with either of the others, but each subscriber shall only be made severally and separately liable to the amount authorized by him individually in the power of attorney, given by him to the attorneys above mentioned. Nor shall any joint liability be created on behalf of the subscribers hereto, in any matter arising out of the business to be carried on under this agreement, but only a several liability on behalf of each individual subscriber. No policy, however, shall be issued on behalf of any individual subscriber hereto, unless each of the individual subscribers insures for a like amount on said policy.

"14th—All receipts or earnings of the business contemplated by this agreement shall be kept by the attorneys in fact in a separate bank account, in their name as such attorneys, and not in any way mingled with their own funds. They shall render accounts to the advisory committee at least once in each month, or oftener if required, and shall make returns and payments of balances to such advisory committee at least once in every three months, and oftener if required by the said committee.

"15th—All funds in the hands of the advisory committee shall be kept separately, and a separate bank account shall be kept by the committee for all uninvested funds, which bank account shall be in the names of such committee.

Each of the undersigned, in consideration of the premises and of the execution of this agreement by the others, does hereby severally agree for himself, individually, to and with the others, and with each of them, that he and his representatives and assigns, will faithfully abide by and carry out his obligations and covenants hereunder.

"In testimony whereof, each of the subscribers has hereto set his hand and seal, on the day and year set opposite his name.

"Each member of the association also executed a power of attorney in the form following, viz.:

"Know all men by these presents, That I do hereby constitute Aaron H. Rathbone, Frederick W. Satterlee, Cleveland D. Fisher, and John D. Dorrance, my attorneys, in fact, for me and in my name, place and stead to insure individuals, firms, or corporations against all lawful risks injuries, losses, and liabilities, excepting marine losses, losses by fire and death from natural causes, upon such conditions as they may deem to my interest; for such purpose to make and issue all binding contracts and policies of isurances; to subscribe such policies in my name, with the amount insured by me thereon, which shall in no case exceed the sum of five hundred (500) dollars on any one risk, unless such excess shall have been provided for by re-insurance; to change or modify the terms of any policy so issued; to annul or cancel the same; in their discretion to re-insure any and all such risks so taken and insured in such manner as shall be deemed by them most advantageous to my interests; provided always, that no such insurance or policy or re-insurance shall be made in my name or for my account unless a like insurance policy or re-insurance on the same risk be made at the same time and on the same terms, for and in the name of each and every other person for whom they shall at the time be acting as attorneys under power similar to this, severally and not jointly, for an equal amount, as provided in the articles of agreement entered into by me with various other persons on the..... day of....., 189.., of which agreement copy has been furnished to said attorneys.

"This power is given, and the exercise of all faculties thereunder is subject to the control and direction of the advisory committee acting under the provisions of the articles of agreement hereinabove referred to, and the said attorneys are instructed and directed to turn over to such advisory committee all premiums, notes, moneys, or things of value belonging to me which shall come into their possession in the premises at least once in every three months, and as much oftener as they may be thereto required by said advisory committee.

"To demand, collect, sue for, receive and receipt for all premiums which may at any time become due to me.

"Also to receive notices and proofs of loss and interest, and all other notices and proofs under any policy issued by virtue hereof, and in all respects to manage and do in and about such insurance and all notices or claims thereunder, as they shall deem best for my interests.

"Also to adjust and pay out of any moneys in their hands belonging to me any loss, claim, or demand that may arise from or under any policy issued in my name under this power. And in case of suit being brought against me on any such loss, claim, or demand, to appear for me and in my name to defend or compromise such suit. Also, with the advice and concurrence of the advisory committee, to stipulate in my name that I will abide by the event of any suit which may be brought against any other party to the articles of agreement already mentioned, upon any policy which shall have been likewise subscribed in my name by virtue hereof.

"Also to do and perform for me and in my name every other act and thing, in relation to any policy made by virtue hereof, as fully as I could personally do.

"Provided always, that my said attorneys shall in no case make any policy of insurance by virtue of these presents, by

which I shall be made to insure jointly with any other person or which shall in any way make me liable for the acts of any other person or insurer, or which shall bind or affect me otherwise than by a several and individual liability to the amounts insured or subscribed by me individually or in my name.

"In testimony whereof I have hereunto set my hand and seal in the city of New York, on the.....day of....., 189..

"Sealed and delivered in presence of

"....."

The form of policy used by the association, and issued to those whom it insures, is as follows:

CLASSIFICATION A.

No..... $.....

GUARANTEE AND ACCIDENT LLOYDS.

New York.

Age..... Weekly Indemnity $.....

In Consideration of.....dollars paid, and of the warranties and agreements contained in the application for insurance, which application is made a part of this contract, each of the subscribers hereto, as a separate underwriter, does for himself and not one for the other, hereby

Insure (subject to the conditions hereon).....

of .....

by occupation a.....

from 12 o'clock noon of the.....day of.....189.., to 12 o'clock noon of the.....day of.....189.., and for such further period of time as may be covered by duly authorized renewal receipts subject to the conditions and provisions expressed therein.

Against Loss of Life, Eye or Eyes, Loss (Separation) of Limb or Limbs at or above the wrist or ankle, provided such loss occurs within ninety days of the happening of the accident causing the same, also against the loss of time while immediately, continuously and wholly disabled and prevented from transacting any and every kind of business pertaining to the occupation above stated, not to exceed sixty-five consecutive weeks (except when so disabled for life), provided the loss for which any claim is made is not caused or contributed to by any form of disease, but is caused exclusively by bodily injuries leaving external and visible marks of contusion or wounds upon the body, effected by external, violent, and accidental means during the continuance of this insurance, in the following sums, to-wit:

1.	For loss of life as aforesaid.....	$5,000.00
2.	For loss of both hands as aforesaid....	5,000.00
3.	For loss of both feet as aforesaid.....	5,000.00
4.	For loss of one hand and one foot as aforesaid	5,000.00
5.	For loss of both eyes as aforesaid.....	5,000.00
6.	For permanent total disability for life as aforesaid	3,000.00
7.	For loss of the right foot as aforesaid..	2,500.00
8.	For loss of the left foot as aforesaid..	2,500.00
9.	For loss of the right hand as aforesaid.	2,500.00
10.	For loss of the left hand as aforesaid..	1,500.00
11.	For loss of one eye as aforesaid....	650.00
12.	For loss of time per week, as aforesaid (in lieu of all other benefits).....	25.00
13.	The loss in subdivision I is payable to	

if surviving, if not, to the legal representatives of the assured. Other loss to the assured.

14. The assured shall have the privilege of travelling in any of the civilized portions of the globe, by confining himself to the usual routes and the ordinary means of conveyance.

15. The loss of one or both eyes, feet or hands, or failure duly to pay any premium, will immediately terminate this insurance.

16. Each of the subscribers hereto shall be and is individually liable for one-hundredth part of the amount insured hereunder.

17. Affirmative proofs of loss and proof of insurable interest under subdivisions 1, 2, 3, 4, 5, 7, 8, 9, 10 and 11, shall be furnished to the attorneys of the subscribers within four months of the happening of the accident causing the same, and under subdivisions 6 and 12 within one month after termination of total disability, and no proceeding in law or equity shall be brought to recover payment under this policy unless such suit or proceeding shall be commenced within six months of the filing of such affirmative proofs and against only one of the underwriters at one time. A final decision in any suit so brought shall be decisive of such claim against each of the underwriters, and each underwriter hereto waives any limitation as to costs, and agrees to abide, by the event of any such suit, and authorizes the attorneys to pay the assured out of any funds in their hands the amount due under this policy. Each of the underwriters hereby authorizes the attorneys to receive and admit service of process for him in any suit brought as aforesaid.

18. If the assured shall be fatally or nonfatally injured, while temporarily or otherwise exposed to a hazard pertaining to an occupation or employment classed by the subscribers as more hazardous than that here given, the liability hereunder shall be only for such amount as is provided for the class in which such more hazardous occupation or exposure is rated, in the manual of the Guarantee and Accident Lloyds.

19. All losses under this policy are payable at the Home

Office in New York, ninety days after receipt of proofs of loss satisfactory to the attorneys of the subscribers.

Each of the present subscribers as a separate underwriter binds himself severally and not jointly with any other for the true performance of the premises for the amount expressed to be insured by him.

In Witness Whereof the subscribers, as separate underwriters do severally subscribe their names at the City of New York, this.....day of....., 189..."

Here follow the names of the members:

Signed "by....., Attorneys."

CONDITIONS.

Not Waivable by Agents.

"The conditions under which this policy is issued and accepted by the assured are as follows:

"This insurance shall not be held to extend to or cover disappearances, nor to any injuries received while engaged temporarily or otherwise in any act or thing pertaining to blasting, wrecking or to the manufacture, transportation or handling of gunpowder, or any explosive substance or article in any way, shape or manner, except the use of firearms by sportsmen, nor while riding on a railroad train in any place or places except those provided for the transportation of passengers, or while walking or being upon any bridge or road bed of any railway.

"The assured suffering a loss for which a special sum is stated herein, shall not be entitled to any other indemnity, for the same injury, and the total amount of indemnity hereunder in any one year (twelve months) shall not exceed the sum named herein as death indemnity.

"In the event of an accident or injury for which or from

which, directly or indirectly, any claim may be made under this policy, notice shall be given in writing signed by the assured, his attending physician, or beneficiary, mailed within ten days of the happening of such accident, and addressed to the Manager of the Accident Department of The Guarantee and Accident Lloyds at New York, stating the full particulars as to when and where and how it occurred, and the occupation of the assured at the time, his policy number and his address.

"A representative of the subscribers shall be allowed to examine the person or body of the assured in reference to any injury or cause of death, when and as often as may be reasonably required in their behalf.

"The subscribers or their attorneys shall have a right to terminate this policy and insurance, by mailing to the assured at his address as furnished, a notice of such termination, and a check or draft on New York for all unearned premiums standing on the books of the Lloyds to his credit.

"This insurance shall not be held to extend to or cover injuries received, whether fatal or nonfatal, that are caused wholly or in part, directly or indirectly, by or in consequence of disease; fighting, scuffling, lifting or over-exertion, unnecessary exposure to danger (voluntary or otherwise); war, riot, or in consequence of violating the law, by inhalation or otherwise (voluntary or involuntary) of any form of gas or gasses; injuries intentionally inflicted; injuries received while under the influence of intoxicating drinks, or narcotics or in consequence thereof; sunstroke, freezing, suicide (felonious or otherwise, sane, or insane); contact with any poisonous substance.

"In the event that a claim shall be made under this policy for loss of one hand or one foot, and the assured shall have more than one other policy of accident insurance covering such loss, the liability hereunder shall be only for such proportionate part

of the amount of such loss of hand or foot named herein as one policy bears to the total number of policies held by the assured.

"By the acceptance of this policy the assured absolutely agrees and consents that in any action, proceeding or investigation in which this Lloyds is interested, any physician who has been or may be at any time consulted by him professionally, may testify under oath, before any court, tribunal or officer, concerning any ailment, disease, injury or affliction, bodily or mental, constitutional or otherwise, that he is or has been or may be suffering from.

"Should the assured engage in an occupation more hazardous than that named herein, it shall operate immediately to reduce the indemnity named herein to that provided for such more hazardous occupation according to the manual of the Guarantee and Accident Lloyds then in use, with the same effect as if the policy had been canceled and a new one issued accordingly, the premiums however remaining the same.

"DIVIDEND BOND NOTICE.

"This policy participates in the benefits of the dividend bond class, when the premiums are paid annually in advance.

"NOTICE.

"In case of injury notice must be given immediately to

"W. D. CHASE,

"Guarantee and Accident Lloyds."

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